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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 5, 1947.

CERTIORARI GRANTED DECEMBER 15, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR., PETITIONERS,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Third Circuit	1	1
Appendix to appellant's brief	1	1
Record from D. C. U. S., District of New Jersey	1	1
Docket entries	1	1
Notice of petition to suppress evidence	2	2
Petition to suppress evidence	3	3
Proceedings before United States Commissioner	5	4
Appearances	5	4
Complaint against Samuel Monticello	5	4
Complaint against Jack Trupiano, et al.	8	6
Testimony of William Van De Car (for the prosecution)	10	7
William Van De Car (for the defendants	31	26
Berthold O. Nilson (for the prosecution)	34	29
Berthold O. Nilson (for the defendants)	58	49
Oliver J. Gettel (for the prosecution)	72	61

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—4108

	Original	Print
Appendix to appellant's brief—Continued		
Record from D .C. U. S., District of New Jersey—Continued		
Proceedings before United States Commissioner—Continued		
Testimony of—Continued		
Oliver J. Gettel (for the defendants)	74	62
Copeland Kell (for the defendants)	84	70
Government affidavit of Homer Casey	110	93
Berthold O. Nilsen	113	95
Oliver J. Gettel	116	97
William A. Van De Car	121	101
Opinion, Forman, J.	123	103
Order denying petition to suppress evidence	128	107
Stipulation in lieu of designation of contents of record on appeal	129	107
Assignments of error	130	108
Letter dated September 29, 1947 from Anthony A. Calandra to Hon. John Biggs, Jr.	131	109
Assignment of additional Judge	133	110
Opinion, per curiam	134	111
Judgment	135	111
Clerk's certificate	136	112
Order granting petition for certiorari	137	113

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9394

UNITED STATES OF AMERICA, Appellee,

v.

JACK TRUPIANO, ROMILDO RICCIARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR., Appellants

Appeal from the District Court of the United States for the District of New Jersey

Appendix to Appellant's Brief

DOCKET ENTRIES

1947

Feb. 5. Petition to Suppress Evidence and Notice of Motion filed on Feb. 1, 1947.

Feb. 5. Notice of Allocation of case to Trenton filed.

Feb. 10. Hearing on motion to Suppress Evidence—Decision reserved (Forman).

Feb. 11. Affidavit of Oliver J. Gettel filed on 2/10/47.

Feb. 11. Affidavit of Berthold O. Nilsen filed on 2/10/47.

Feb. 11. Affidavit of Homer Casey filed on 2/10/47.

Feb. 11. Affidavit of William A. Vandecar filed on 2/10/47.

Mar. 5. Opinion denying motion to suppress filed on 3/4/47 (Forman).

Mar. 31. Order denying motion to suppress filed (Forman).

Apr. 3. Notice and Grounds of Appeal filed on 4/1/47.

Apr. 14. Assignments of Errors filed on Apr. 12, 1947.

Apr. 22. Stipulation in lieu of Designation of contents of record on appeal filed.

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

NOTICE FOR PETITION TO SUPPRESS EVIDENCE—Filed February 1, 1947

To the Hon. Edgar H. Rossbach, United States District Attorney, Post Office Building, Newark, New Jersey.

Please take notice that upon the verified petition of Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., petitioners, upon a certain complaint made against the defendants and upon all of the proceedings heretofore had wherein a motion will be made in the United States District Court for the District of New Jersey, Post Office Building, Trenton, New Jersey on the 10 day of February, 1947, or as soon thereafter as counsel can be heard for the following relief:

1. That all papers, records and documents and other property seized by the Government be returned to the defendants.

2. That any and all still equipment, mash, alcohol, and other property so seized be suppressed and that the United States Attorney for the District of New Jersey and the Agents of the Alcohol Tax Unit and their aid-s be restrained from using the aforesaid property, matters and things in any trial or hearing; and any information directly or indirectly obtained therefrom and by means thereof.

3. That all such property so unlawfully seized be returned to the petitioners and for such other and further relief as may be just and proper.

Respectfully, Anthony A. Calandra, Attorney for Petitioners.

[fol. 3] IN UNITED STATES DISTRICT COURT

PETITION TO SUPPRESS EVIDENCE—Filed February 5, 1947

Now Comes the Defendants Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., and state and allege as follows:

1. That the complaint made on or about June 4th, 1946 charged the defendants with violation of the Internal Revenue Laws of the United States of America in that the defendants possessed, owned and controlled, a still, operated a distillery, fermented mash and possessed and concealed alcohol, contrary to the provisions of the statute in such cases made and provided.

2. That on the night of June 3rd, 1946 the defendants were arrested at the Kell Farm, in Wall Township, Monmouth County, New Jersey by agents of the Alcohol Tax Unit without a warrant for their arrest and said agents unlawfully seized their property, to wit: a still, alcohol, mash and other equipment necessary and appertaining thereto without a search warrant.

3. The said agents had no right to enter the premises and make a search and seizure and arrest the defendants.

4. Defendants claim that their rights were invaded at the arrest and seizure of the aforesaid property and ask and pray for the return thereof and that the evidence, if it is intended to be used against them obtained without a lawful search warrant, be suppressed under the provisions of the Fourth and Fifth Amendments of the United States Constitution; and further pray that all such evidence be excluded and suppressed at any trial or hearing that may be had by virtue of the complaint made by the said agents as aforesaid and that all of the aforesaid property so unlaw-
[fol. 4] fully seized without a search warrant and obtained by means of a trespass should be returned.

Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole, Riordan J. A. Roett, Jr.

AFFIDAVIT OF PETITIONERS

STATE OF NEW JERSEY,
County of Essex, ss.:

Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., each severally being duly sworn according to law on their oaths depose and say:

1. That they are the petitioners named in the foregoing petition and that they have read and know the contents of the foregoing petition and that the same is true to the best of their knowledge, information and belief.

Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole, Riordan J. A. Roett, Jr.

Sworn and subscribed to before me this — day of October, A. D. 1946.

[fol. 5]

Proceedings Before the United States Commissioner

Asbury Park, New Jersey,

Tuesday, June 18, 1946.

Before Commissioner David Goldstein

APPEARANCES:

For the Government John A. Waldron, Esq., Assistant United States Attorney.

Samuel Cohen, Esq., Legal Assistant to the Alcohol Tax Unit.

For the Defendants Anthony A. Calandra, Esq.

* * * * * * *

COMPLAINT AGAINST SAMUEL MONTICELLO

UNITED STATES OF AMERICA,
District of New Jersey, ss.:

Before me, David Goldstein, a United States Commissioner for the District of New Jersey, this day personally appeared William A. Van De Car, who being first duly

sworn, deposes and says that on or about the 3rd day of June, 1946, at the Kell Farm in Wall Township, Monmouth County, in said District, Samuel Monticello, 151 So. Munn Avenue, Newark, N. J. unlawfully, knowingly, and wilfully,

First Count: In violation of 27 USC 203, engaged in the business of distilling distilled spirits, without a basic permit as therein prescribed; and

[fol. 6] Second Count: In violation of Sec. 2900 (a) of the Internal Revenue Code, failed to pay the tax on distilled spirits, distilled as aforesaid; and

Third Count: In violation of Sec. 2803 (a) of the Internal Revenue Code, possessed distilled spirits, the immediate containers of which did not have affixed thereto the requisite stamp; and

Fourth Count: In violation of Sec. 2810 (a) of the Internal Revenue Code, had in his possession and custody, and under his control, a still and distilling apparatus set up, which was not duly registered with the collector of the district in which it is; and

Fifth Count: In violation of Sec. 2812 (a) of the Internal Revenue Code, engaged in the business of a distiller without giving the notice required by said subsection; and

Sixth Count: In violation of Sec. 2814 (a) of the Internal Revenue Code, engaged in the business of a distiller without giving the notice prescribed by said subsection, and without executing a bond prescribed therein; and

Seventh Count: In violation of Sec. 2833 (a) of the Internal Revenue Code, engaged in and carried on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him; and

Eighth Count: On May 31, 1946, in violation of Sec. 2803 (a) of the Internal Revenue Code, transported distilled spirits, the immediate containers of which did not have affixed thereto a stamp denoting the quality of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits; and

[fol. 7] Ninth Count: On May 31, 1946, in violation of Sec. 2913 of the Internal Revenue Code, removed distilled spirits on which the tax had not been paid, to a place other than the internal revenue bonded warehouse provided by law;

All contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States.

(Deponent's Signature) William A. Van De Car.
(Title) Investigator of the Alcohol Tax Unit, United States Treasury Department.

Sworn to and subscribed in my presence this 4th day of June, 1946. David Goldstein, United States Commissioner, District of New Jersey. (Seal.)

[fol. 8] Complaint Against Jack Trupiano et al.

United States of America,
District of New Jersey, ss:

Before me, David Goldstein, a United States Commissioner for the District of New Jersey, this day personally appeared William A. Van De Car, who being first duly sworn, deposes and says that on or about the 3rd day of June, 1946, at the Kell Farm in Wall Township, Monmouth County, in said District, Jack Trupiano, 58 Belmont Ave., Belleville, N. J., Romildo Riccardelli, 179 So. Essex Ave., Orange, N. J.; Anthony Antoniele, 600 Columbus St., Alexandria, Va.; Frank Pugliese, 336 13th Ave., Newark, N. J.; Riordan J. A. Roett, Jr., 109 Essex St., Hackensack, N. J.; and Joseph Monticello, 151 So. Munn Ave., Newark, N. J. unlawfully, knowingly, and wilfully,

First Count: In violation of 27 U. S. C. 203, engaged in the business of distilling distilled spirits, without a basic permit as therein prescribed; and

Second Count: In violation of Sec. 2800 (a) of the Internal Revenue Code, failed to pay the tax on distilled spirits, distilled as aforesaid; and

Third Count: In violation of Sec. 2803 (a) of the Internal Revenue Code, possessed distilled spirits, the immediate containers of which did not have affixed thereto the requisite stamp; and

Fourth Count: In violation of Sec. 2810 (a) of the Internal Revenue Code, had in their possession and custody, and under their control, a still and distilling apparatus set up, which was not duly registered with the collector of the district in which it is; and

[fol. 9] Fifth Count: In violation of Sec. 2812 (a) of the Internal Revenue Code, engaged in the business of distillers without giving the notice required by said subsection; and

Sixth Count: In violation of Sec. 2814 (a) of the Internal Revenue Code, engaged in the business of distillers without giving the notice prescribed by said subsection, and without executing a bond prescribed therein; and

Seventh Count: In violation of Sec. 2833 (a) of the Internal Revenue Code, engaged in and carried on the business of distillers with intent to defraud the United States of the tax on the spirits distilled by them;

All contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States.

(Deponent's Signature) William A. Van De Car.
(Title) Investigator of the Alcoholic Tax Unit, United States Treasury Department.

Sworn to and subscribed in my presence this 4th day of June, 1946. David Goldstein, United States Commissioner, District of New Jersey. (Seal.)

* * * * * * *

[fol. 10] William Van De Car, being first duly sworn in behalf of the Government, testified as follows:

Direct examination,

By Mr. Waldron:

Q. Mr. Van De Car, what is your official position?

A. I am an investigator of the Alcohol Tax Unit.

Q. And in such official capacity were you present on June 3rd in the vicinity of the Kell Farm in Wall Township?

A. I was.

Q. Will you tell what you observed?

A. On June 3rd at about 11:45 P. M. I accompanied Investigator-in-charge Oliver J. Gettel, and Investigator Homer Casey, to the Kell Farm.

On approaching this farm we detected a very strong odor of fermenting mash. Further along the farm I heard a motor in operation. I couldn't tell whether it was electrically driven or what but it was very loud and it came from

the premises of a frame building and, with the other two investigators, Mr. Gettel and Mr. Casey, I separated from them and went to the side of the building where the noise was coming from and I came to a doorway and looking in through this door I observed a still column and a large boiler, and also a motor off to the left of the door. At the same time I observed a man bending down just to the right of the motor directly in front of me.

I arrested this man due to the fact that I had seen a violation in my presence, of a still. The still was not in operation at the time although there was a fire in the boiler, it being banked. This man was the gentleman, over on the extreme—near the window, Anthony was the man I apprehended at the time. That gentleman (indicating).

The Commissioner: What is the full name, do you know? Is that Mr. Anthony Antoniole?

[fol. 11] The Witness: That's right. At the time Investigators Gettel and Casey were outside the still building and I heard Investigator Casey call out and holler, "Hey, Van, get this fellow," and I went out there with Antoniole and found Mr. Roett, this gentleman over here (indicating) in the custody of Investigator Casey. I brought him, with Antoniole, into the still building, handcuffed. Shortly after that I heard a noise outside and Mr. Gettel was calling to someone and then he came into the building with two more men.

Mr. Calandra: Who is "he"?

The Witness: Mr. Gettel. These two men were this chap here (indicating) Pugliese, and Monticello.

The Commissioner: Which Monticello?

The Witness: Joseph Monticello. Sometime after that Mr. Casey came along with another man near the still building and brought him in and that was Sam Monticello, and I asked Sam, "How did you get here?" and he said he walked in. This same Sam Monticello—this is off the record.

Mr. Calandra: Nothing is off the record.

The Witness: I saw Sam Monticello on a previous occasion and that was on *April* 31st, driving a truck known to me as a Hill Top Dairy Products truck and I knew that aboard that truck was a load of ninety odd cans of non-tax paid alcohol.

The Commissioner: What date was that?

The Witness: The 31st day of May, at 6:35 P. M., and I asked Investigator Casey if he would call Investigator-in-charge, Mr. Gettel, at Newark, New Jersey, and inform him of the fact and also tell him that that truck would arrive in the vicinity of Newark at about 6:40 P. M.

[fol. 12] On the still premises, after Sam Monticello had entered and had been placed in custody, Investigators Dell and Fox came in and they had in their custody this chap here (indicating).

The Commissioner: Mention his name.

The Witness: I didn't arrest him and I didn't question him and I don't know his name.

The Commissioner: Can we agree who the gentleman is?

Mr. Calandra: Yes. Which one?

The Witness: This man (indicating).

Mr. Calandra: Mr. Ricciardelli.

The Witness: Mr. Riciardelli and also this gentleman (indicating) in the brown sport coat.

Mr. Calandra: Mr. Trupiano?

The Witness: That's right. They were kept with the other persons who had been apprehended.

I had searched several of the defendants and later on, accompanied by other investigators, brought them to Freehold, the Monmouth County jail, to confine them over night. That was around about two o'clock on the morning of the 4th of June.

Later on that day I came to the United States Commissioner's office and requested an arraignment for the seven persons who had been apprehended.

Q. Mr. Van De Car, let me interrupt you there. As you approached this building, what was its general description? Was it a dwelling or a farm building?

A. It was a frame building built in two heights, one lower than the other. The frame work of the building was what I would call rough lumber or sheeting, built on a cinder block foundation. It was not a home and there was no place where a man would live. It was a building apparently built for the purpose for which it was used, to house a still.

[fol. 13] Q. Was there a fence or signs posted declaring "No trepassing"?

A. There were no signs of any description.

Q. Was there a sign on the building describing these premises as a licensed distillery?

A. I observed none.
Q. Did you observe any such sign inside?
A. No.
Q. Did you observe any cans of alcohol inside?
A. Several hundred cans.
Q. Were there any stamps affixed thereto?
A. On none of them.
Q. Did any of the men that night apprehended show you a permit to operate this still?
A. None did.
Q. Was the still set up and capable of operating?
A. It was.
Q. Did any of these men indicate to you that they had any authority to operate a still?
A. They did not.
Q. Did you question any of the men you arrested?
A. Yes.
Q. Whom did you question?
A. I questioned Antoniole and I asked him several questions after Mr. Roett was apprehended.
Q. What did Mr. Antoniole say?
A. I asked him if he knew Mr. Roett and he said he didn't know him. I asked Mr. Roett the same question, if he knew Mr. Antoniole, and he said he didn't know him.
Mr. Waldron: I have nothing further.

Cross-examination.

By Mr. Calandra:

Q. Are those all of the questions that you asked Mr. Roett and Mr. Antoniole?
A. I asked him where he lived and he said Jersey City.
Q. Anything else?
A. I asked him if he was married.
Q. Yes.
A. And he said he was.
[fol. 14] Q. Yes.
A. And I asked him what his occupation was.
Q. When you say "him", who do you mean?
A. Mr. Roett. I asked him his occupation and he said he was an attorney.
Q. Continue.
A. I don't recall asking him—he asked me several questions.

Q. What were they?

A. He asked if he could talk with me and I said, "Yes, start talking."

Q. And what did he say?

A. Nothing.

Q. And that was the extent of your conversations with Mr. Roett?

A. He had a call to nature and he asked me if he could move outside of the building and I said he could and I took him out and brought him back.

Q. Did you ask him what he was doing there?

A. I didn't.

Q. You didn't. So that is about all you discussed with Mr. Roett?

A. All that I can recall.

Q. Now, with reference to Mr. Antoniole you said you asked him several questions. What were they?

A. I asked him if he knew Mr. Roett and he said he didn't.

Q. Yes. I asked him if he was married and he said he was. I asked him his occupation and he said he was a pilot and I asked him if he was in the armed forces and he said he was and I asked him when he was discharged and I believe he told me in November, with a captain's rating.

I asked him did he still do any flying and he said he did. I asked him if I saw him in the air in a yellow plane recently and he didn't answer that.

Q. You asked him if you saw him in a yellow plane recently?

A. Yes.

Q. And you say he didn't answer?

A. He didn't answer to that.

Q. Did you see him in a yellow plane?

A. I couldn't say it was he but I knew about a plane.

[fol. 15] Q. Just what do you mean by that?

A. I had information that Tony liked to fly a bit around the area.

Q. When did you get that information?

A. I had it for a week or two.

Q. Who gave it to you?

A. That is Government information and I don't care to say.

Q. Was that information given to you by an informer?

Mr. Waldron: I object. What difference does it make who told him? It is hearsay anyway

Mr. Calandra: We are going to find out a lot of things today, Mr. Waldron.

. . . . . .

The Commissioner: The objection is sustained.

Q. Now, Mr. Van De Car, confining yourself for the moment to the night of June 3rd, you say you went on the premises with Mr. Gettel and Mr. Casey.

A. That's true.

Q. Both of whom are representatives or agents of the Alcohol Tax Unit.

A. That is correct.

Q. And this was about 11:30 P. M.?

A. I would say between 11:30 and 11:45 P. M.

Q. You had no search warrant, of course?

A. None.

Q. Do you know whether Mr. Gettel or Mr. Casey or Mr. Dell or Mr. Fox, or Mr. Bennett, or any other agent of the Alcohol Tax Unit, or of any Federal agency, had a search warrant?

A. I do not know.

Q. And if a search warrant had been obtained, you would know about it?

A. I believe I would.

Q. So that your testimony is accurate that there was no search warrant.

A. As far as I know there was none.

[fol. 16] Q. Now, what time did you get to the property in question, the entire cortege?

A. About 11:45 P. M.

Q. You said before 11:30, what did you mean by that?

A. I said in my first testimony about 11:45.

Q. Very well. And who else was with you besides Mr. Gettel and Mr. Casey?

A. No one was with me.

Q. Where was this barn building situated with reference to the road which would lead you on to the property which housed this barn?

A. There is a sort of main road leading to the Kell Farm premises proper but there is a road to the right that leads down directly to the still premises.

Q. And that is the road that you went down.

A. I didn't.

Q. How did you get there?

A. I went around by the main road and crossed through a field to the side of the still premises.

Q. Were Mr. Gettel and Mr. Casey there with you?

A. They separated from me when I went through the field.

Q. That was by prearrangement that Mr. Casey and Mr. Gettel separated from you?

A. That's right.

Q. And how far off this road, this main road, would you say, was the barn building which housed the still?

A. This is a lane I would call it, or a road, leading to the farm house. The distance between the road, across the field, that would be a couple of hundred yards.

Q. And how far from the farm house was this barn building which housed the still?

A. Approximately the same distance.

Q. And you stated that this was known as the Well Farm.

A. Yes.

Q. How do you spell that?

A. Kell, K-e-l-l.

Q. And you knew, did you, that the farm premises belonged to Kell?

A. I did.

Q. When did you learn that?

[fol. 17] Mr. Waldron: I object. I didn't examine this gentleman on direct examination on that matter and I object to it on the ground that it is immaterial.

. . . . . .

The Commissioner: I will let it go in tentatively.

Mr. Waldron: This is in the nature of a fishing expedition. No materiality at all has been shown. What difference does it make who owns the farm?

Mr. Calandra: Your Honor has allowed me to continue. Let us have the question repeated.

The Commissioner: Do you say, Mr. Calandra, that the ownership of this farm is something which is directly related to the issues involved in this proceeding?

Mr. Calandra: Yes, sir, it has a considerable bearing.

. . . . . .

Mr. Waldron: May I have the question read.

(The following testimony was thereupon read by the reporter:

"Q. And you knew, did you, that the farm premises belonged to Kell? A. I did.

"When did you learn that?")

. . . . . .

(The following question was thereupon read by the reporter: "When did you learn that?")

A. A couple of weeks previous to the still seizure.

Q. That is when you learned that Kell—what is the first name——

A. I don't know.

Q. —was the owner of the farm, right?

A. That's right.

[fol. 18] Q. And you obtained that information for a purpose, didn't you?

A. Yes.

Q. What was the purpose?

Mr. Waldron: I object.

The Commissioner: I will sustain that objection.

. . . . . .

By Mr. Calandra:

Q. Mr. Van De Car, you got to this barn building on the evening of June 3rd, right?

A. The night of June 3rd.

Q. And, of course, you knew where to go?

A. Yes.

Q. Sure. You had seen that barn building on numerous occasions prior to June 3rd.

A. No.

Q. You had not? Had you been in the vicinity of the barn building prior to June 3rd?

A. Yes. Not in the immediate vicinity.

Q. How close to it were you?

A. Several miles.

Q. Did you get an odor of mash back there, two miles away?

A. No.

Q. You didn't.
A. No.
Q. And that is the closest you got to it until this night on June 3rd, several miles, two miles away.
A. Yes.
Q. And when you got to the barn building was the door closed?
A. It was open.
Q. Who opened it?
A. It was open.
Q. Who opened it?
A. I don't know.
Q. Who did you see in the building?
A. Tony.
Q. Anybody else?
A. Not another soul.

The Commissioner: That is inside the building?
The Witness: Yes, he was inside the building.

Q. Did you see anybody come out of the door before you entered it?
A. I didn't.
[fol. 19] Q. No question about that.
A. No question about that.
Q. Now, look around this courtroom and see if you don't see somebody who was in that barn building and left it prior to your entering.

(Witness looks around room.)

Q. Take your time when you are looking around.
A. I still insist I see no one in this room who I saw leave that barn building.

The Commissioner: Prior to the time you entered it.
The Witness: That's right.

Q. And this door was wide open?
A. It was.
Q. Unusual for a barn housing a still to have a wide open door, isn't it?
A. It was a pretty warm night and it was open.
Q. Somebody opened that door for you didn't they, Mr. Van De Car?
A. I don't know, I didn't see it.

Mr. Waldron: I object.

Q. And wasn't it your informer who opened the barn door?

A. Not to my knowledge.

Q. Did you see farmer Kell that night?

A. I did.

Q. Where?

A. Near his home.

Q. And where was his home with reference to the barn building?

A. About two hundred yards away.

Q. Did you have a conversation with him?

A. I didn't.

Q. Who did?

A. Mr. Gettel talked with him.

Q. Were you there when he was talking with him?

A. Yes.

Q. What did Mr. Gettel say to him and what did he say to Mr. Gettel?

A. I don't know. I wasn't close enough to hear them talk.

[fol. 20] Q. Where did the conversation take place?

Mr. Waldron: I object. There is nothing in the examination to show that this testimony is now material. Mr. Calandra is trying to void a prior ruling on your Honor's part.

The Commissioner: The objection is sustained.

Q. How long did Mr. Gettel and yourself and Mr. Casey stay with farmer Kell before you left the house building?

A. Possibly five minutes.

Q. You were in the same room with them?

A. I was in no room with them.

Q. Where did the conversation take place?

A. Outdoors.

Q. And you were standing away from them?

A. Yes, sir.

Mr. Waldron: I object.

The Commissioner: The question has been answered.

Mr. Waldron: I object to this line of questioning as not being proper cross-examination.

The Commissioner: Let's see what the next question is.

Q. So you separated from them.

A. I did.

Q. And you went directly to the barn building.
A. That's true.
Q. Did anybody tell you where to go?
A. Yes.
Q. Who?
A. Mr. Gettel.
Q. And you entered this barn building through this wide open door.
A. I did.
Q. And was that the only door in the barn that housed the still?
A. All that I saw at that time.
[fol. 21] Q. Did you see any other since?
A. Yes, later I saw another door.
Q. Was that door closed when you went there?
A. Apparently it was. I didn't see it in the dark.
Q. And when you went into the barn you made the customary observation of what was in there.
A. At a glance I saw what was in there, right in front of my face.
Q. Did you make an observation and inspect the whole building?
A. I didn't inspect the whole building at that time. At a glance I saw a still and a boiler and that was all I needed to see.
Q. And because you saw that and you saw Mr. Antoniole in there you arrested Mr. Antoniole because, you said, a crime was committed in your presence.
A. That's correct.
Q. What was Mr. Antoniole doing?
A. Bending over near a gasoline driven pump.
Q. Was the place dark?
A. No, it was illuminated by two large dry cell battery lamps.
Q. And you could see very plainly?
A. Not too plainly.
Q. You could see clearly?
A. Not too clearly but you could see outlines of objects.
Q. When did you first get information that there was a still in operation——

Mr. Waldron: I object to that, if your Honor please.
Mr. Calandra: May I finish the question?
The Commissioner: All right.

Q. When did you first get information that there was a still in operation on the Kell farm?

Mr. Waldron: I object.

The Commissioner: Objection sustained.

[fol. 22] Q. You knew, did you not, some week or ten days before when you learned that Kell owned the farm that there was something wrong going on there, did you not?

Mr. Waldron: I object. That is not the nature of this inquiry.

The Commissioner: The objection is sustained.

Q. All right. You say on the night of May 31st you observed a Hill Town Dairy truck——

A. Hill Top Dairy truck.

Q. Hill Top Dairy truck?

A. Yes.

Q. Where did you see the truck?

A. Out on Route 34, on the highway.

Q. Just where?

A. Approximately two miles from the Kell Farm.

Q. What did that truck look like?

A. I would say it was a refrigerator built type of truck. There was a door on the side and on the rear and it has "Hill Top Dairy Products" painted on the side with a number 3 on the rear and a little padlock.

Q. Did you have any information on that truck?

A. I did.

Mr. Waldron: I object.

Mr. Calandra: He testified on direct examination that he knew that the truck contained alcohol, ninety cans, he said. May I ask him about it?

The Commissioner: I think so.

Mr. Calandra: May I have the question repeated.

(The following question and answer was thereupon read by the reporter:

"Q. Did you have any information on that truck?

"A. I did.")

[fol. 23] The Witness: I had previously observed the truck.

Q. Where?

A. On highway 34.

Q. Did you ever see it go to the Kell Farm?
A. No.
Q. Did you ever see it on the Kell Farm?
A. No.
Q. What was the nature of your information—not the source.
A. The nature of the information was that the truck was being used for the illicit transportation of non-tax paid alcohol.
Q. And when did you get that information? How long prior to May 31st?

Mr. Waldron: I object. It doesn't make any difference whether he got it yesterday or the day before.

. . . . . .

"Q. And when did you get that information? How long prior to May 31st?"
A. I had it for a couple of weeks.
Q. Had you observed that truck—I will withdraw that. How many times had you observed that same truck during that couple of weeks?
A. Probably five or six times.
Q. What did you see it do?
A. Travel the highway.
Q. And that is all?
A. That's all.
Q. How did you know at 6:30 or 6:35 P. M. on the night of May 31st that this truck containing ninety cans of alcohol?

Mr. Waldron: I object.
Mr. Calandra: You asked him that question, Mr. Waldron.

. . . . . .

Mr. Calandra: May I have the question repeated.

[fol. 24] (The following question was thereupon read by the reporter:
"How did you know at 6:30 or 6:35 P. M. on the night of May 31st that this truck contained ninety cans of alcohol?")

A. I received the information from a reliable source.
Q. How reliable?
A. Absolutely the best.

Q. I can imagine. Did you also have information at that time as to where this alcohol was being manufactured? Meaning now, the night of May 31st, 1946.

A. I had that information.

Q. Yes, and you knew then that it was coming from the Kell Farm, didn't you?

A. Yes.

Q. You did. And you had known that alcohol was being manufactured on the Kell Farm for some time prior to May 31, 1946, didn't you?

Mr. Waldron: That is not in issue here.

The Commissioner: Are you objecting to it?

Mr. Waldron: Yes, sir.

The Commissioner: I will sustain that objection.

Mr. Calandra: Very well.

Q. Now, Mr. Van De Car, if I am incorrect in my statement I want you to correct me but I understand by your testimony now that on June 3, 1946, sometime around 11:30 P. M., or shortly thereafter, you went on this Kell Farm for the first time.

A. That is correct.

Q. That you stopped and that somebody, Mr. Gettel and Mr. Casey, had a conversation with farmer Kell.

A. That is correct.

Q. That pursuant to the direction of Mr. Gettel you went directly to the barn, he pointed it out to you or told you where you would find it.

A. Find what?

Q. The barn.

A. That's right.

[fol. 25] Q. And he told you there was a still in there, right?

A. He didn't tell me that.

Q. What did he tell you?

A. He told me to go to that building and he pointed it out to me.

Q. For what?

A. Evidently that was where the odor of mash was emanating from.

Q. Well, he gave you a reason to go to the barn, didn't he?

A. Naturally.

Q. What was it?

A. To see what was in the barn.
Q. And when you got there this door was wide open?
A. That's correct.
Q. And you saw nobody come out?
A. That's correct.
Q. And in there you saw Antoniole?
A. Yes.
Q. Working with dim lights around something in there.
A. That's correct.
Q. Is he the only person whom you saw committing any of the violations which you charged in these complaints, and you are the complaining witness?
A. No.
Q. Who, of the others, did you see do anything that violated the laws of the United States which caused you to charge them, in so many counts, with these violations?
A. Sam Monticello.
Q. What did he do?
A. Driving the Hill Top Dairy truck.
Q. When?
A. On the 31st day of May.
Q. Did you see the alcohol load in the truck?
A. I didn't.
Q. Did you see the alcohol in that truck at all?
A. No, sir.
Q. From the time you first observed it on the highway.
A. No, sir.
Q. Your information then was merely what somebody told you, that there were ninety cans of alcohol on there.
A. Reliable information.
[fol. 26] Q. And was that all that you observed Sam Monticello do with reference to each one of these counts that you charge against him in this complaint which you signed before his Honor, on June 4th? Specifically, the first count, that he did, in violation of 27 USC 203, engage in the business of distilling distilled spirits, without a basic permit as herein prescribed; and on the

Second Count, that he did, in violation of Sec. 2900 (a) of the Internal Revenue Code, fail to pay the tax on distilled spirits, distilled as aforesaid; and on the

Third Count, that he did, in violation of Sec. 2803(a) of the Internal Revenue Code, possess distilled spirits, the immediate containers of which did not have affixed thereto the requisite stamp; and on the

Fourth Count, that he did, in violation of Sec. 2810(a) of the Internal Revenue Code, have in his possession and custody, and under his control, a still and distilling apparatus set up, which was not duly registered with the collector of the district in which it is; and on the.

Fifth Count, that he did, in violation of Sec. 2812(a) of the Internal Revenue Code, engage in the business of a distiller without giving the notice required by said subsection; and on the

Sixth Count, that he did, in violation of Sec. 2814(a) of the Internal Revenue Code, engage in the business of a distiller without giving the notice prescribed by said subsection, and without executing a bond prescribed therein; and on the

Seventh Count, that he did, in violation of Sec. 2833(a) of the Internal Revenue Code, engage in and carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him; and on the

Eighth Count, that he did, on May 31, 1946, in violation of Sec. 2803(a) of the Internal Revenue Code, transport distilled spirits, the immediate containers of which did not [fol. 27] have affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits; and on the

Ninth Count, that he did, on May 31, 1946, in violation of Sec. 2913 of the Internal Revenue Code, remove distilled spirits on which the tax had not been paid, to a place other than the internal revenue bonded warehouse provided by law.

Mr. Waldron: I object.

Mr. Calandra: He is making the complaint.

Mr. Waldron: The complaining witness need not of his own knowledge know of the violation provided he has reasonable grounds to believe.

The Commissioner: Is there any dispute about that?

Mr. Calandra: I asked him a very pertinent question. He is the complaining witness and I ask him now what he knows about Sam Monticello.

Mr. Waldron: And he answered you previously.

Mr. Calandra: And I want to know if that is all that he knows about Monticello and I have a right to ask that. He is the accuser against this man.

The Commissioner: I think that is proper. I think it is proper to ask this witness questions which are directed to his knowledge of the facts set forth in the complaint. It is quite true that you might be able to supply testimony of other witnesses but counsel has a right to ask this witness on cross examination whether he knows of other acts relating to this defendant. If he does, let him tell us and if he doesn't, he can say so. I don't see any objection to that. Let's have the question repeated.

(The following question was thereupon read by the reporter: "Q. Was that all that you observed Sam Monti-[fol. 28] cello do with reference to each one of these counts that you charge against him in this complaint which you signed before his Honor on June 4th").

A. It was not all.

Q. What else did you see Sam Monticello do that caused you to make this complaint?

A. I saw him as he came out of the wooded area right in the immediate vicinity of the open still.

Q. When?

A. On the morning of June 1st—that is, June 4th, early in the morning.

Q. Where were you?

A. Standing in the doorway with Tony in custody.

Q. On June 1st?

A. On June 4th.

Q. That morning?

A. Yes, very early that morning.

Q. And you were standing in the doorway of the building that housed the still. What was he doing?

A. I heard him talking.

Q. You say you heard him talking?

A. Yes.

Q. What did you hear him say?

A. He said "Me, me." because he was asked a question by Antoniole.

Q. And what did Antoniole say?

A. Nothing.

Q. Could you see the still or any illicit equipment from the open door of the barn on that morning? This is daylight.

A. No, it was still in darkness.

Q. Early in the morning?

A. Yes.

Q. What time?

A. About a quarter to two or half-past one.

Q. Where were you?

A. Right there at the still.

Q. And this was hours before the raid was made.

A. No, the raid—the still was seized on the night of the third, at 11:45 P. M.

Q. And this was the morning of the first.

A. No, the morning of the fourth. I said that. That comes after three, four comes after three, not one.

[fol. 29] Q. That's right. You knew then, did you not Mr. Van De Car, that there was a still in the barn.

A. Sure, we seized it.

Q. What town was this farm and still located in?

A. Wall Township.

Q. How far is that from Commissioner Goldstein's office here in Asbury Park?

A. Probably fifteen miles; probably. I don't know the exact distance.

Q. Who else was with you?

A. Mr. Gettel and Mr. Casey.

Q. And they saw the same thing you did?

A. After I did.

Q. And they were right there.

A. After I had been in the place they came in.

Q. We are talking now about the morning of June 1st——

The Commissioner: June 4th. Let's get it straight.

The Witness: June 4th.

The Commissioner: That is the date he testified to.

Q. Let's go back to the first of June. Did you say something about the 1st of June or the morning of the fourth?

A. Nothing about the first.

Q. The morning of what?

A. The 4th of June.

Q. The 4th of June?

A. Yes.

Q. Was this after or before the raid?

A. After. The raid was the night of the 3rd of June, approximately 11:45.

Mr. Waldron: I object to this as being repetitious. It serves no useful purpose.

The Commissioner: I do think, Mr. Calandra, I don't want to cut you short or deprive you of a rather wide lati- [fol. 30] tude of examination at this hearing but I would ask you to bear in mind the essential and peculiar nature of a preliminary hearing and try to handle your cross examination so that there will be no unnecessary repetition.

Mr. Calandra: Yes, sir.

Q. Before June 3, 1943 did you see Sam Monticello at the Kell Farm?

A. I did not.

Q. At no time?

A. No, sir, I was never there before.

Q. Before June 3rd, did you see Antoniole at the Kell Farm?

A. No, I did not.

Q. And when I say the Kell Farm with reference to these two men I am referring to the barn building housing the still.

A. That's right.

Q. All right. Did you see Pugliese at the barn building which housed the still prior to the night of the raid?

A. I did not.

Q. Did you see Joseph Monticello there?

A. I did not.

Q. Did you see Mr. Trupiano?

A. I didn't.

Q. Did you see Mr. Roett prior to the night of the raid?

A. I did not.

Q. Did you see Mr. Ricciardelli there prior to the night of the raid?

A. No.

Q. At no time?

A. No.

Q. Now, did you talk with any of the other defendants, aside from Mr. Roett and Mr. Antoniole?

A. I talked to Sam.

Q. What did he say to you and what did you say to him?

A. I asked him how he got there and he said he walked in.

Q. And that was all?

A. That's all.

Q. That was the extent of your conversation with him?

A. That's right.

[fol. 31] Q. Did you talk to Pugliese?

A. Only that he said he was a little bit cold and I said I was sorry but I had nothing to warm him up with.

Q. And did you talk to Ricciardelli?

A. No, I didn't, not at all.

Q. And with Joseph Monticello, did you talk to him?

A. He said he was cold and I said, "Casey, give him your coat," and he gave him his coat.

Q. Did he say anything to you?

A. No.

Q. Did any of the men say anything as to what they were doing there?

A. No.

Mr. Calandra: Now I want to make him my witness. I am through with my cross examination.

* * * * * * *

William A. Van De Car, was thereupon called as a witness on behalf of the Defendants.

Q. Mr. Van De Car, when did you first learn that there was a still on the Kell Farm?

Mr. Waldron: I object to that as being immaterial. It doesn't make any difference on what farm the still is.

Mr. Calandra: This is my case.

Mr. Waldron: And I am objecting.

* * * * * * *

"Q. Mr. Van De Car, when did you first learn that there was a still on the Kell Farm?")

Mr. Calandra: He charges these men with a still, Commissioner, and that goes right to the gravamen of the complaint.

The Commissioner: I will allow the question to be answered. Answer the question.

The Witness: A couple of weeks previous to the raid.

[fol. 32] Q. You received that information. Was that from a very reliable source?

A. It was.

Mr. Waldron: I object. He is now testifying to hearsay.

The Commissioner: I will overrule the objection as coming too late and, further, that the question is proper.

Q. Who did you tell this information to?
A. I didn't tell it to anyone, it was told to me.
Q. Did you tell it to your superiors?
A. He knew about it.
Q. Who is "he"?
A. Mr. Gettel.
Q. Mr. Gettel knew two weeks prior to the day of the raid that there was a still in this barn on the Kell Farm, right?
A. I believe so.
Q. Did you ever talk to Kell about it?
A. Never.
Q. You knew Kell?
A. I saw him once.
Q. You knew it was his farm, right?
A. That's true.
Q. Why didn't you lock him up for permitting a violation of the Internal Revenue laws to be committed on his premises?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Did Kell have a permit, a license or authority to operate a still on that farm?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Was Kell arrested in this case?

Mr. Waldron: The same objection.
The Commissioner: Objection sustained.
[fol. 33] Q. Will he be arrested in this case?

Mr. Waldron: I object.
The Commissioner: Sustained.

Q. This information that you received from this very reliable source that there was a still on the Kell Farm, was revealed by you completely as you got it reported to you to Mr. Gettel?
A. No.
Q. Who else did you tell it to besides Mr. Gettel?

Mr. Waldron: I object to that as putting words in the witness' mouth.

Mr. Calandra: He said he spoke to Mr. Gettel. I will withdraw that.

Q. You say Mr. Gettel already knew there was a still on that property, is that right?

A. I believe he did.

Q. Well, did you talk to him about it?

A. He talked to me about it.

Q. And he told you he knew that there was a still on this property?

A. I don't recall that he said he absolutely knew there was. He talked to me about it.

Q. Well, what did he say to you about it?

A. He believed there was a still in on this property, that's all he told me.

Q. Did you ask him the source of this information?

A. I didn't.

Q. Did he ask you to do anything with reference to his belief that there was a still on this farm?

A. Yes.

Q. What did he ask you to do?

A. To go to work on it.

Q. And what did that mean to you?

A. An observation and investigation.

Q. And from that time on you made observations to determine if there was a still there and how many people were connected with it.

A. That's true.

[fol. 34] Q. And during all of this time you made these observations?

A. Yes.

Q. And when was it first confirmed to you that there was a still on the property?

A. On the night of the 3rd, 11:45, when I actually saw it, that was confirmation.

Q. You didn't believe Mr. Gettel when he told you he believed there was a still there?

A. Yes, sir.

Q. You did believe him?

A. Yes.

Mr. Calandra: All right, that is all.

Mr. Waldron: I have nothing further.

The Commissioner: Call your next witness.

BERTHOLD O. NILSON, being first duly sworn in behalf of the Government, testified as follows:

Direct examination.

By Mr. Waldron:

Q. Mr. Nilson, what is your official capacity?

A. I am an investigator of the Alcohol Tax Unit.

Q. And in such capacity were you present on the Kell Farm, Wall Township, on May 31, 1946?

A. I was.

Q. Did you observe the defendant, Samuel Monticello, on that evening?

A. I did.

Q. Tell us what you observed.

A. Why, Mr. Monticello came to the farm, the barn, with the Hill Top Dairy truck and I assisted Mr. Monticello in loading five gallon cans of alcohol. After loading the alcohol Mr. Monticello again drove the Hill Top Dairy truck away from the farm.

Q. Will you point out Mr. Monticello, please. (Witness indicates a gentleman present.)

The Commissioner: Let the record indicate that the witness pointed to Samuel Monticello, one of the defendants in this case.

[fol. 35] Q. On the evening of June 3rd were you present at the Kell Farm?

A. I was.

Q. What part of the Kell Farm?

A. I was at the barn housing the still.

Q. Tell us what you observed and who you observed at that time.

Mr. Calandra: Can you fix the hour, please.

Q. The evening of June 3rd, approximately 11:15.

A. At 11:15 on June 3rd I was in the barn with Antoniole.

Q. Point him out, please.

(Witness indicates gentleman in room.)

A. This gentleman sitting here.

The Commissioner: Indicating the defendant Antoniole in this proceeding.

A. About 11:20 I left the barn and went through the door and sat on a concrete block adjacent to the door in front of the barn. I sat there for a few moments. At about 11:30 to 11:45 I saw a man come around the far corner of the barn. This man didn't see me. I waited until this man reached the door that was open at the time. With the outline of the man in the door I recognized him as one of our investigators. As soon as this man——

Mr. Calandra: His name, please.

The Witness: Investigator Van De Car. After this man had entered the barn I arose from my seat and went over the fence adjacent to the barn that lead to the cow yard and proceeded on up the hill. While going up the hill I met Investigator-in-charge Gettel and Investigator Casey. I identified myself to these men and proceeded to the farm house.

[fol. 36] Q. Previous to 11:15, early in the evening of June 3rd, did you observe anyone else on the stil- premises?

A. I did.

Q. Name them and indicate them, please.

A. I saw Roett and Mr. Trupiano and Mr. Ricciardelli and Mr. Antoniole.

Mr. Calandra: What time was that, please?

Q. Approximately what was the time of the observation?

A. I would say about 5 P. M.

Q. About 5:00. And what were these men doing?

Mr. Calandra: Each one, specifically.

A. Mr. Trupiano was doing the cooking. Mr. Ricciardelli was tending the furnace. Mr. Antoniole was assisting in general. He assisted in filling cans and he was assisted in that operation by Mr. Roett.

Q. Prior to the time did you observe any other men participating in the operation of this illicit still?

A. Prior to what time?

Mr. Calandra: June 3rd.

The Witness: I did, sir.

Mr. Waldron: I move to strike that question, sir——

Mr. Calandra: I object to that. He asked the question and the witness answered it. By what right can he move to strike?

The Commissioner: It was not answered.

Mr. Calandra: Yes, it was.

The Commissioner: If the question has been answered I don't think you have a right to withdraw the question, or rather to move to strike it out.

Q. Who else did you observe and the approximate time and date.

A. And date?

[fol. 37] Q. Strike that out, please. Did you observe Frank Pugliese in the vicinity of the still premises?

A. Not prior to June 3rd.

Q. Not prior to June 3rd?

A. Not prior to June 3rd.

Q. When did you observe Mr. Pugliese?

A. I observed Mr. Pugliese after the raid. I returned to the barn and observed the defendants through several holes, from outside of the barn.

Q. Where was Mr. Pugliese?

A. Mr. Pugliese, when I saw him, was with the group of defendants that had been apprehended and they were in front of the alcohol receiving tank in the barn.

Q. And did you observe Joseph Monticello?

A. I observed Joseph Monticello at that time also.

The Commissioner: But this was after the raid.

The Witness: Yes, sir, this was after the raid.

Q. Did you observe Monticello prior thereto?

Mr. Calendra: Which one?

Mr. Waldron: Joseph.

A. I did, sir.

Q. What time and where?

A. At approximately—I don't have the notes to make this very definite now——

Q. Approximately, sir.

A. I should say the day of June 3rd, approximately, the day of June 3rd, about 1 P. M. That is approximately.

Q. What was he doing?

A. He arrived at the still premises in an automobile, a green automobile, in which he brought yeast and booster.

Q. What do you mean by "booster"?

A. Booster is a product known by that name to the trade and its purpose is to aid fermentation.

Mr. Waldron: That is all.

[fol. 38] Cross-examination.

By Mr. Calandra:

Q. Mr. Nilson, you say you are an investigator of the Alcohol Tax Unit?

A. That is correct, sir.

Q. And how long have you been such investigator?

A. Approximately two years.

Q. Two years?

A. Yes.

Q. And how long have you been assigned to New Jersey?

A. I have been in New Jersey since the start of my employment as investigator of the Alcohol Tax Unit.

Q. And you are connected with the Newark office?

A. I am connected with the Newark office, yes, sir.

Q. And you say that on the afternoon of June 3rd, at about 1:00 P. M., you saw Joseph Monticello arrive at the premises in question and make a delivery of yeast and booster?

A. That is correct, sir.

Q. And did he immediately leave after he deposited these materials there?

A. He did, sir.

Q. He did. Who did he deliver them to?

A. They were not delivered to anyone in particular. They were delivered to the still house.

Q. They were delivered to the still house and left there?

A. Yes.

Q. And you were in there, of course, at the time.

A. Yes, sir.

Q. And who else was in there with you?

A. Mr. Trupiano, Mr. Ricciardelli, Mr. Roett and Mr. Antoniole.

Q. Now, please tell us what each one of these gentlemen were doing in there at the time when this booster and yeast was delivered by Joseph Monticello? Instead of saying "they", name each one individually and tell us what he was doing.

A. Mr. Trupiano was cooking. Mr. Ricciardelli was tending the furnace. Mr. Antoniole and Mr. Roett were assisting in general. That is, it is difficult to say exactly what they were doing but they were assisting in the filling of the cans [fol. 39] and getting down the empty cans prior to fil-ing them, and so forth.

Q. What were you doing in there?

A. I was assisting in general. I wasn't doing anything specific at the particular time, if I recall, I brought some empty cans from the pile over to be filled and I was taking some of the filled cans and putting them on the pile.

Q. And this was on June 3rd?

A. Yes.

Q. In the afternoon?

A. That is right.

Q. And you remained in the barn building all the time, the building that housed the still?

A. Except to go to the farm house for supper and later on, if I recall, I returned to the farm house for a package of cigarettes.

Q. And when did you return to the barn again, how long prior to 11:30 or 11:15?

A. Oh, I was there at about 10:00 P. M.

Q. And what did you go there for?

A. We were at that time waiting for a load of sugar to arrive.

Q. And who is "we"?

A. Antoniole and Mr. Roett.

Q. And this load of sugar was scheduled to arrive at 10:00 P. M.?

A. The load of sugar was scheduled to arrive that evening.

Q. Did it arrive?

A. No, sir.

Q. When did you first see Mr. Gettel and Mr. Van De Car and Mr. Dell and Mr. Fox and Mr. Casey that day?

A. At approximately 11:45 I saw Investigator-in-charge Gettel and Investigator Casey.

Q. Where?

A. They were coming down over the hill to the adjacent cow barn as I was going up the hill.

Q. And you knew they were coming?

A. Yes, sir.

Q. When did you know they were coming?

Mr. Waldron: I object to that as being immaterial, when he knew they were coming.

[fol. 40] Q. When did you first know they were coming at that hour?

Mr. Wildron: I object.
The Commissioner: I will permit that question.

A. I didn't know exactly what time those investigators were coming.
Q. But you knew they were going to be there that night, didn't you Mr. Nilson?
A. That I did, sir.
Q. And by what manner or means did you get that information?

Mr. Waldron: I object.
The Commissioner: I think it is improper.
Mr. Calandra: I will withdraw the question.

Q. When did you first know they were coming that night?
A. At about 10:00 P. M.
Q. How did you get the information?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. But you knew they were coming in the night time, did you not?

Mr. Waldron: I object.
The Commissioner: Objection sustained.
Mr. Calandra: I pray an exception, if your Honor please. I am entitled to know when he knew they were coming.
The Commissioner: I think he answered the question.
Mr. Waldron: Yes, he said approximately ten o'clock, he knew.
[fol. 41] The Commissioner: Yes, I thought he answered the question and that is the reason I sustained the objection.
Mr. Calandra: All right.

Q. Was it by prearrangement——

Mr. Waldron: I object.
Mr. Calandra: You don't know what I was going to ask. May I finish, please?

Q. Was it by prearrangement with Mr. Van De Car that at about ten o'clock that night you were to walk outside the barn building that housed the still and leave the door conveniently open for Mr. Van De Car, and just sit by the concrete rock? Was that prearranged?

Mr. Waldron: I object.

The Commissioner: On what grounds do you object?

Mr. Waldron: It is not material whether it was prearranged or whether it was accidental.

The Commissioner: What have you to say about that, Mr. Calandra?

Mr. Calandra: It is very pertinent. Here is a violation of law that is certainly not open to the public. It is obvious there was no breaking in by Agent Van De Car. The door was conveniently left open and he sat on this concrete rock at the doorway, and when he saw Van De Car come up and when he got close to the doorway he knew it was Van De Car, and he was very careful to say that he looked and recognized it was an agent——

The Commissioner: I will allow it over the objection. Let us have the question again.

[fol. 42] (The following question was thereupon read by the reporter:

"Q. Was it by prearrangement with Mr. Van De Car that at about ten o'clock that night you were to walk outside the barn building that housed the still and leave the door conveniently open for Mr. Van De Car, and just sit by the concrete rock? Was that prearranged?")

A. No, sir, it was not.

Q. Why did you leave the door open?

A. I didn't open the door, sir.

Q. Who opened the door? I will withdraw that.

Q. How did you get out of the barn building at ten o'clock through the open door? Was the door always left open?

A. That it was, sir.

Q. There is no question about it.

A. No, sir.

Q. Why were you sitting on the concrete rock at ten o'clock outside this open door?

A. I don't recall saying I sat outside at ten o'clock.

Q. Well, you sat on the rock until the time came for Mr. Van De Car to arrive. Why did you sit out there?

Mr. Waldron: I object. It hasn't been established that there was an arrangement with Mr. Van De Car to arrive.

The Commissioner: I think it is a proper question and I will allow it. The question is why he sat out there. He said there was no prearrangement and he said he sat there and

whatever the reason was why he sat out there, I think he can answer the question and I don't see any harm in his doing so. I will overrule the objection.

A. I sat outside just to get a breath of fresh air.

Q. How long were you sitting out there for that breath of fresh air?

A. Approximately ten minutes.

[fol. 43] Q. And it was then that Mr. Van De Car arrived, right?

A. Yes, sir.

Q. And when he arrived you immediately went away.

A. Yes, sir.

Q. And you went on over the hill.

A. Yes, sir.

Q. And did you know you were going to meet Mr. Gettel and Mr. Casey up over the hill?

A. No, sir.

Q. Did you know where you were going to meet them at all?

A. No, sir.

Q. But you knew they were going to be there, didn't you?

A. Yes, sir.

Q. You did.

A. Yes, sir.

Q. And you learned that for the first time on June 3rd, that they would be there that night.

A. Yes, sir.

Q. And you said you identified yourself to Mr. Casey and Mr. Gettel.

A. Yes, sir.

Q. Why did you do that? Mr. Gettel was your superior, wasn't he?

A. Yes, sir.

Q. Why did you have to identify yourself to him?

A. Coming up the hill I ran into these two men and I surmised at that time that they were Mr. Gettel and Mr. Casey.

Q. And that was because you knew they were going to meet you.

A. There was no prearranged meeting place at that time.

Q. Is that your customary way of departing from this barn, by going up over the hill? Was that in the direction

of the farm house where you were supposed to be eating and living?

A. Yes, sir.

Q. That was your customary way of going?

A. Yes, sir.

Q. And did you report that to Mr. Casey and to Mr. Gettel, that that was your customary way of leaving the barn building when you were through with your daily toil in the still?

A. No, sir.

[fol. 44]. Q. You didn't tell them that?

A. No.

Q. So it was just by coincidence or accident that you met them over the hill, is that right?

A. It was coincidental that they met me at that particular spot, yes.

Q. And this hill is in the opposite direction from where this farm building was, where your cousin Kell was living.

Mr. Waldron: I object. This is cross examination and it must be limited to the direct examination.

Mr. Calandra: He said he ate at the farm house.

The Witness: I don't recall saying that.

Mr. Waldron: Who this cousin is has not been established by the direct examination.

The Commissioner: Is there an objection?

Mr. Waldron: Yes, sir.

The Commissioner: I will sustain the objection.

Q. Do you know Kell?

A. Yes, sir.

Q. How long did you know Kell?

A. Approximately four months.

Q. And Kell is the owner of the farm, isn't he?

A. Yes, sir.

Q. And Kell introduced you to these men as his cousin, didn't he?

A. Some of these men. As his wife's cousin.

Q. As his wife's cousin?

A. Yes.

Q. And when was the introduction made and whom did you meet at that introduction and where?

A. That introduction was made approximately three and a half months prior to the actual raid.

Q. Where was the introduction made?

A. At the Kell Farm.

Q. Did Kell know that you were an investigator of the Alcohol Tax Unit at that time?

[fol. 45] Mr. Waldron: I object.

The Commissioner: The objection is sustained.

Q. Who did Kell introduce you to?

A. Mr. Roett——

Q. Yes.

A. Mr.——

Q. From the very first time that you met anybody allegedly connected with this case, Mr. Nilson.

A. Mr. Trupiano, Mr. Ricciardelli.

Q. When did you first know that a still was going to be erected on this property?

Mr. Waldron: I object, if your Honor please. That is not in issue.

The Commissioner: What difference does it make, Mr. Calandra?

Mr. Calandra: A lot of difference.

. . . . . .

Q. Let me ask this question. Among all of these accused defendants who did you meet first?

A. Mr. Roett.

Q. Where?

A. At the Kell Farm.

Q. When?

A. Do you mean when I was first formally introduced to Mr. Roett?

Q. Yes, that is what we are talking about?

A. About three and a half months prior to the raid.

Q. Was there a still in the barn then when you first met Mr. Roett?

A. No, sir.

Q. Who introduced you to Mr. Roett?

A. No one, formally.

Q. How did you meet him?

A. I was in his presence.

Q. Where?

A. At the Kell Farm.

Q. Who else was present?

A. Mr. Trupiano.

Q. As of when are you talking about now? You answered the question a moment ago when I asked you who was the [fol. 46] first man that you met and you said Mr. Roett.

A. That is correct.

Q. Was he alone?

A. No, sir.

Q. All right, who else was with him?

A. Mr. Trupiano.

Q. Yes.

A. Mr. Ricciardelli.

Q. Was there a still in the barn then?

A. No, sir.

Q. Was there a barn on the premises then?

A. No, sir.

Q. What conversations did you have with Mr. Trupiano and Mr. Roett? By the way, were those the only persons who were present at the very first meeting?

A. No, sir.

Q. Who else was present?

A. Mr. Kell.

Q. That's all?

A. That's all.

Q. What was the conversation about?

Mr. Waldron: I object unless he shows how this is material.

Mr. Calandra: He is going to tell you that.

The Commissioner: I think this is proper cross examination. I will allow it.

Q. What was the conversation about?

A. The conversation was about the erection of a building and the setting up of a distillery on the Kell property.

Q. Who was that conversation held with?

A. That conversation was between Mr. Roett and Mr. Kell.

Q. And you participated in that conversation?

A. No, sir.

Q. Did Trupiano participate in the conversation?

A. Yes, sir.

Q. What did he say?

A. I don't recall exactly what Mr. Trupiano said at that conversation.

Q. What did Mr. Roett say?

A. I also cannot clearly recall or quote him as to what he said to Mr. Kell at that time.

[fol. 47] Q. You don't remember. Did you make any notes of it?

A. Yes, sir.

Q. You don't have them here?

A. No, sir.

Q. Did you make up a report on this case? If one of the agents have a copy of the report here you may have my permission to use that report to refresh your recollection.

Mr. Waldron: I object and I suggest that you ask the gist of the conversation.

Mr. Calandra: I don't know what it was. He was there.

* * * * * * *

(The following question was thereupon read by the reporter: "Q. Did you make up a report on this case?")

A. No, sir.

Q. You have made no report up yet?

A. No, sir.

Q. You are required to, aren't you?

Mr. Waldron: I object.

The Commissioner: Objection sustained.

Q. Do you now ask the assistance or aid of any of the agents here to whom you furnished this information, relating to the notes you made, to give them to you so that you may testify under oath? I want to give you all the opportunity in the world to get the proper information here.

Mr. Waldron: We represent to you now that no report is in our hands from which this gentleman can testify to the facts required by defendants' counsel.

Mr. Calandra: There are six or seven agents here in this room and they undoubtedly know about it.

Mr. Waldron: If Mr. Calandra believes these agents have that information he is at liberty to put them on and ask them.

[fol. 48] Mr. Calandra: I may do that, too.

The Commissioner: Do you know whether or not any of the agents of the Alcohol Tax Unit, or whether the Assistant United States Attorney has the notes or memoranda which you made in connection with these conversations?

The Witness: No one has those notes outside of myself.

By Mr. Calandra:

Q. Where are they?

A. They are in my personal possession.

Q In your personal possession?

A. That is, I don't have them on my person but they are in my own locker, shall we say.

Q. All right. When you had this first meeting three and a half months ago, did the conversation relate to the erection of the barn, and the well, and that it was to house a still?

A. I didn't mention a well, sir. However, it was incorporated.

Q. And did you relay that information immediately to Mr. Gettel, your superior?

Mr. Waldron: I object.

Mr. Calandra: It calls for a yes or no answer.

The Commissioner: I will sustain it.

Q. Did you report that information to anybody?

Mr. Waldron: I object.

The Commissioner: Sustained.

Q. What were you doing at this farm on that very first day when Mr. Roett and Mr. Trupiano came there?

A. If I recall clearly, I was assisting Mr. Kell in some farm operation.

[fol. 49] Q. You were working on the farm there prior to the first meeting three and a half months ago?

A. Yes, sir.

Q. You were?

A. Yes, sir.

Q. What kind of work were you doing there?

A. Prior to the first meeting with Mr. Roett and Mr. Trupiano and Mr. Ricciardelli I was engaged in farm operations.

Q. Working for Mr. Kell?

(Witness does not answer.)

Q. You ought to know whether you were working for Mr. Kell or not, prior to that time, Mr. Nilson.

Mr. Waldron: I insist that the same courtesy that was extended to the first witness be extended to this gentleman, if your Honor please.

Mr. Calandra: He is a Government investigator and this is not so long ago. He is an experienced investigator and he can answer that question.

The Commissioner: I will overrule the objection because I feel, as the cross-examination has developed to this point, I feel that the question that has just been asked has a very direct and logical relationship to what has been testified to just previously. Will you answer the question, please.

A. At that time I was employed as an investigator for the Alcohol Tax Unit.

Q. Then you were not working for Kell?

A. Only under pretense.

Q. And who gave you the authority to work for Mr. Kell under pretense?

Mr. Waldron: I object to that as being immaterial.

Mr. Calandra: He is a Government investigator.

Mr. Waldron: That is the answer.

[fol. 50] The Commissioner: I will overrule the objection. I think the question is proper.

Q. Who gave you the authority?

A. I was given the assignment by Investigator-in-charge Gettel.

Q. Yes, and the reason for that was that you, as a result of conversations which you heard and participated in, between Kell, Roett, Trupiano and another, you knew that the still was going to be set into the barn that was to be erected on the premises, didn't you, all of which you reported to Mr. Gettel, is that right?

A. Yes, sir.

Q. Sure, and that was the pretense of your farm employment, correct?

A. Yes, sir.

Q. All right. And therefore, each time that you met and spoke with any of these defendants against whom you have testified, you reported everything that was transpiring, their activities and what you yourself were doing, did you not?

A. At different periods, yes, sir.

Q. Yes, and as the barn went up, you reported that, right?

A. Yes, sir.

Q. And as the road was made, you reported that, right?

A. Yes, sir.

Q. And as the still equipment went in you reported that, right?

A. Yes, sir.

Q. All of which you reported to your superior, Mr. Gettel, is that right?

A. Yes, sir.

Q. And when the still started to operate you reported that, didn't you?

A. Yes, sir.

Q. When did it start to operate?

A. Approximately three weeks prior to the actual raid.

Q. Why didn't you then arrest each and every one of the men connected with that still operation?

Mr. Waldron: I object. The question has no materiality. Mr. Calandra seeks to charge this gentleman with a duty not imposed upon him by law. He is acting under instructions of higher authority.

[fol. 51] Mr. Calandra: Then let him say so, if that is the proposition.

The Commissioner: The question is, why he didn't arrest them?

Mr. Calandra: That is correct. He is participating in an offense. He is a Federal officer, acting under authority or orders, but he is participating in defrauding the Government of taxes and that is the gravamen of these charges and by his own answer he says this still was in operation for three weeks before anything happened.

The Commissioner: Is it your idea that it is this officer's duty to arrest?

Mr. Calandra: It is every officer's duty to arrest anyone who commits a crime in his presence and Mr. Van De Car was very careful to testify, by comparison, that when he saw this still in that barn—that he walked in and saw Antoniole fooling around with something in there and he placed him under arrest because, he said, a crime was being committed in his presence.

The Commissioner: I will overrule the objection.

Mr. Calandra: May I have the question repeated.

(The following question was thereupon read by the reporter:

"Q. Why didn't you then arrest each and every one of the men connected with that still operation?"

A. I had no instructions from my superiors to that effect.

Q. Well, a crime was being committed in your presence, wasn't it?

The Commissioner: I think this would be a good time to take a noon recess.

(Hearing adjourned from 12:30 P.M. until 1:30 P.M.)

[fol. 52] Hearing resumed.

Cross-examination.

By Mr. Calandra (continued):

(The following question was thereupon read by the reporter:

"Q. Well, a crime was being committed in your presence, wasn't it?"

A. Yes.

Q. And you were a Federal agent on that day.

A. Yes, sir.

Q. And during all the times from three and a half months ago when you first met Mr. Roett, and the others, and Kell, you continued to be a Federal agent.

A. Yes.

Q. And on the Federal payroll.

A. Yes.

Q. And you were not on leave during this period of time we are speaking of, during this three and a half or four months.

A. No, sir.

Q. Now, you were in the barn each day the still was in operation?

A. Yes, sir.

Q. And what were your duties, what was your work?

A. My duties were the unloading and the loading of the trucks, dumping and mixing sugar, and adding yeast and booster in order to make the mash.

Q. You were what was commonly known as a mash man.

A. That's right.

Q. And how many hours a day did you work?

A. The hours varied. I would start some mornings very early, start the fire and get the steam up, and sometimes I would have a few hours out in the morning and then return back and continue on until various hours in the evening.

Q. When you were out the few hours in the morning those were the hours you would confer with your co-agents and give them the information as to what was going on?

A. No, sir.

[fol. 53] Q. That was your leisure time?

A. That is correct.

Q. How frequently did you report the activities of each of the men who were at the still, to your superior?

Mr. Waldron: I object to this general line, we are going very far afield.

The Commissioner: I think so too.

Mr. Calandra: I will withdraw the question.

Q. Did you during the three and a half week period that you confined yourself to working in or at the still, making mash and filling cans and starting up the furnace, did you take samples of mash and alcohol?

A. Yes, sir.

Mr. Waldron: I object because it has not been brought out on direct examination. If he wants to make him his witness I have no objection.

Mr. Calandra: And his answer is "Yes, sir".

The Commissioner: Let us have the question and answer repeated.

(The following question and answer was thereupon read by the reporter):

"Q. Did you during the three and a half week period that you confined yourself to working in or at the still making mash and filling cans and starting up the furnace, did you take samples of mash and alcohol?

"A. Yes, sir."

Q. You took samples out of mash and alcohol, right?

A. I took samples of the alcohol.

Q. Not of mash?

A. Not of mash.

Q. And what did you do with the samples?

A. I retained them in my possession until I was able to turn them over to the Investigator-in-charge.

[fol. 54] Q. And when did you turn them over to the Investigator-in-charge and what is his name, please.

A. I turned them over to Investigator-in-charge Gettel about a week before the still was raided.

Q. Together with a report of the activities of each of the individuals who have been charged under these complaints?

A. Only with the samples.

Q. Well, did you inform Mr. Gettel of the names of the individuals with whom you were working or who were paying you for your work?

A. Verbally.

Q. You told him that verbally?

A. Yes.

Q. And you told him that from time to time?

A. Yes.

Q. And how much were you getting per week for your hire?

Mr. Waldron: I object.

Mr. Calandra: He said he worked there and was employed.

The Commissioner: What difference does it make, even if he wasn't getting anything, or whether he was getting a great deal of money? How does that bear on the question of whether these defendants committed the crime with which they are charged?

Mr. Calandra: He said he was being paid and I am asking him how much he was being paid. What harm is there in it?

The Commissioner: That is not the test.

Mr. Calandra: I want to ask him next who paid him.

The Commissioner: That still would make no difference.

Mr. Calandra: It would make considerable difference.

The Commissioner: Will you tell me how?

Mr. Calandra: I will withdraw the question.

[fol. 55] Q. Mr. Nilson, when did you agree to go to work in this still and with whom did you make that agreement?

A. I agreed to work in the still about the latter part of April and I made that agreement with Mr. Roett.

Q. Only Mr. Roett?

A. In the presence, of course, of Mr. Trupiano and Mr. Ricciardelli and Mr. Antoniole.

Q. And what was your agreement with these men?

A. My agreement was that I was to work as mash man for a salary of $100 a week.

Q. And did you get $100 a week?

A. Yes.

Q. And, of course, you turned that money over to Mr. Gettel?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Did you turn it over to Mr. Gettel?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. What did you do with the money?

Mr. Waldron: I object.
Mr. Calandra: On what ground?
Mr. Waldron: What he did with any emolument is immaterial to the issue.
The Commissioner: I will sustain the objection.
Mr. Calandra: Exception.
The Commissioner: Tell me once again with whom the agreement was made. I believe you said Mr. Roett. In whose presence, did you say?
The Witness: Mr. Trupiano, Mr. Ricciardelli, and Mr. Antoniole.
The Commissioner: Very well.

[fol. 56] By Mr. Calandra:

Q. And these four men agreed to pay you $100 a week to act as mash man, is that right?
A. Yes, sir.
Q. Did you assist in the erection of the still?
A. Yes, sir.
Q. What did you do?
A. I assisted in the construction of the building and the erection of the still. I put in bolts, framework for the column, the superstructure, and the setting up of the vats.
Q. Did you assist in the erection and putting in of the still proper?
A. That was in connection with the superstructure, yes.
Q. And you were paid for that?

Mr. Waldron: I object. He testified to that.
Mr. Calandra: He said he was getting $100 a week as mash man.

A. The agreement was that my salary was to start as soon as the alcohol started to run.
Q. And all work that you did prior to that was not to be paid for?

A. I wasn't paid for it.

Q. All right. You were not paid for it. How much did Kell pay you for being a farm hand there during the time these boys were setting up the works?

Mr. Waldron: I object. He didn't testify to that on direct examination and I must object, if your Honor please.

The Commissioner: Objection sustained.

. . . . . .

Q. Kell knew what was going on and what was to take place at the first meeting and when you were introduced to these men by Kell, right?

[fol. 57] Mr. Waldron: I object. This is not proper cross-examination. The testimony as to what took place between Kell and himself has already been limited and it is not material here and we are going far afield from the establishment or denial of a prima facie case.

The Commissioner: What does Kell's knowledge or non-knowledge of the still itself have to do with this case? What does it have to do with the question as to whether or not these defendants committed the various offenses with which they are charged in the complaint?

Mr. Calandra: Couldn't they have been enticed? Wouldn't you want to know that, Mr. Commissioner? I am sure that you would, sir.

Mr. Waldron: That is a matter of defense which he must establish by his own witnesses and not mine.

Mr. Calandra: You say it is not proper cross-examination. Very well. At this time I ask that Mr. Nilson now be my witness.

Mr. Waldron: Have you concluded your cross examination?

Mr. Calandra: Yes, with but one question, and then I will make him my witness.

Q. Did you, on the night of June 3rd, arrest any one of these defendants, and I shall name them; Roett, Trupiano, Ricciardelli, Pugliese, Samuel Monticello, Joseph Monticello, and Antoniole?

Mr. Waldron: I object. The question has already been asked and answered and the witness has testified to his actions on the night in question.

The Commissioner: I don't see that it has any great bearing on the case but I will permit him to answer the question. [fol. 58] The objection will be overruled.

A. No, I didn't.

Mr. Calandra: All right. Now, he is my witness.

Mr. Oliver J. Gettel: As the superior officer of this man and under the rules and regulations of the Government concerning the witnesses for the defense, I want to ask that you collect the witness fee for this man before he testifies and also the expenses that are involved in his transportation to and from this point.

Mr. Calandra: What regulation is that?

Mr. Gettel: That is the regulation and the law.

Mr. Calandra: I never heard of that. He is in court and I am now calling him as my witness.

The Commissioner: I think that is correct. If he were not in court and he were subpoenaed to be in court you would have to tender the proper subpoena and pay him his witness fee plus his mileage but he is now in court. You may proceed.

Berthold O. Nilson, was thereupon called as a witness on behalf of the Defendants.

Direct examination.

By Mr. Calandra:

Q. Mr. Nilson, when you first went to the Kell Farm and you there met Mr. Roett and these other two gentlemen, did you go there by the invitation of Mr. Kell?

Mr. Waldron: I object.

The Commissioner: Objection sustained.

[fol. 59] Mr. Calandra: He is now my witness.

The Commissioner: It still has to come within the rules of evidence.

Mr. Calandra: I am laying the foundation.

The Commissioner: I have sustained the objection.

Mr. Calandra: Exception.

Q. Now, at the time when these arrangements were made and the discussion was had that there was a still to go into

a barn that was to be erected there, did you then agree with Roett, Trupiano and Riciardelli and Kell for that to take place?

A. I don't quite understand the question.

Mr. Calandra: I will have it repeated for you.

(The question was thereupon read by the reporter.)

Mr. Waldron: I object your Honor as to whether or not he agreed or didn't agree. That has no bearing on this violation and the establishment of a prima facie case.

. . . . . .

(The following question was thereupon read by the reporter:

"Q. Now, at the time when these arrangements were made and the discussion was had that there was a still to go into a barn that was to be erected there, did you then agree with Roett, Trupiano and Ricciardelli and Kell for that to take place?")

A. I wasn't consulted at that time as to whether or not I agreed.

Q. When were you first consulted as to the fact that this illegal operation was going to take place?

A. At no time was I consulted as to whether I agreed or disagreed.

[fol. 60] Q. Well, you participated in a conversation had between Kell, the owner of the property, and the three men you named, correct?

A. I testified I was there.

Q. Yes, and what conversation took place among you five?

A. I just can't remember exactly what took place.

Q. Well, give us the substance of it.

A. I assume that the conversation was concerning the erection of a building and a still.

Q. And upon what did you base that assumption? What was said upon which you based that assumption?

A. From snatches of conversation I overheard at that meeting and a conversation I had with Kell.

Q. Who was talking to who when you were listening?

A. Mr. Kell was conversing with Mr. Roett.

Q. What did Mr. Kell say to Mr. Roett?

A. I can't testify to what Mr. Kell said to Mr. Roett.

Q. You were there and you were listening and you were there under the pretense of being Mrs. Kell's cousin.

A. Yes.

Q. And under the pretense of being a farm hand, and you are an investigator, and you want us now to understand that you can't remember or don't know the substance of the conversation had?

Mr. Waldron: I object. He is arguing with his own witness and he is now cross-examining his own witness.

Mr. Calandra: I declare him to be a hostile witness and that will settle it.

Mr. Waldron: You have laid no foundation for it, may — please the Court.

Mr. Calandra: He has shown himself to be rather reluctant to answer, your Honor.

Mr. Waldron: That is a conclusion for the Court to reach.

[fol. 61] Q. Are you able to tell us what the conversation was between Kell and Roett and these other two gentlemen, Mr. Ricciardelli and Mr. Trupiano?

A. Not at this time.

Q. Why not?

A. I can't remember exactly what was said and I have no notes to which I can refer.

Q. Did it have to do with the erection of a still?

A. Yes.

Q. You are definite about that?

A. Yes.

Q. Right?

A. Yes.

Q. And what did you say to that?

A. I was not consulted on it.

Q. Did you have any conversation—You were not consulted?

A. No.

Q. But you were there?

A. Yes.

Q. At whose invitation?

A. I wasn't invited. It happened that I was at the Kell Farm.

Q. By direction?

A. Yes.

Q. How long did you know Kell before you first met these men?

Mr. Waldron: I object.

Mr. Calandra: Why? This is my case.

Mr. Waldron: The length of time he knew Kell?

The Commissioner: I think it is relevant. I will allow it.

A. About a week.

Q. A week before the first meeting with Roett?

A. Yes, sir.

Q. What were the circumstances under which you met Kell?

A. I was introduced to Mr. Kell by Investigator Casey.

Q. What were you told before you were introduced to Kell by Investigator Casey?

[fol. 62] Mr. Waldron: I object to the question. He is not only leading his own witness——

Mr. Calandra: I am not telling him what to say but asking him a question.

Mr. Waldron: You haven't laid the proper foundation and even then it will be immaterial. The matter of his relationship has already been testified to.

Mr. Calandra: I want to know how he met him.

The Commissioner: I don't see that it makes any difference what he was told before he was introduced.

Mr. Calandra: All right.

Q. Were you told that somebody was going to put a still on the Kell Farm by Investigator Casey?

Mr. Waldron: I object. This is hearsay. What Investigator Casey said is available to Mr. Calandra and it is immaterial besides.

The Commissioner: I will allow it. This goes now to a very important question so far as this case is concerned and that is whether or not there was entrapment on the part of the Alcohol Tax Unit agency and my feeling in the matter right now is that entrapment does not result from any one single fact. It might possibly result from a great many facts put together. I think it is relevant and you may answer the question. Let us have the question repeated.

(The following question was thereupon read by the reporter:

"Q. Were you told that somebody was going to put a still on the Kell Farm by Investigator Casey?")

A. Investigator Casey told me that he had information that a still was to be erected.

Q. Where?

A. On the Kell property.

[fol. 63] Q. And what else did Mr. Casey tell you?

Mr. Waldron: I object to that. It is still hearsay. Even though it may be relevant the hearsay rule still applies.

The Commissioner: I think that is correct. It is hearsay evidence. I will sustain the objection.

Mr. Calandra: I pray an exception.

Q. Now, did Mr. Casey tell you the name of the individual or individuals who were going to set up this still before you met Mr. Kell?

Mr. Waldron: I object. There is no information in the record that Casey said that.

Mr. Calandra: I am asking him the question.

The Commissioner: I will allow it.

Mr. Waldron: It is still within the hearsay rule. There has been no foundation laid as to whether or not Casey is speaking of his own knowledge or not.

Mr. Calandra: I am only asking him what Casey said. I am bound by his testimony and it is not hurting him at all and even if it is hearsay the Commissioner can rule on it later.

The Commissioner: I will allow it.

Mr. Calandra: May I have the question repeated.

(The following question was thereupon read by the reporter:

"Q. Now, did Mr. Casey tell you the name of the individual or individuals who were going to set up this still before you met Mr. Kell?")

A. No, he didn't.

Q. Did Casey direct you to work up there as a farm hand so as to get these people to come in?

[fol. 64] Mr. Waldron: I object to the wording of the question.

Q. Or aid these people in coming in and going on with this operation.

Mr. Waldron: I object to the question, if the Court please. It is a two-fold question.

Mr. Calandra: I will reframe the question and ask it this way.

Q. Did Mr. Casey or Mr. Gettel or any one of your superiors or co-agents instruct you to go up to the Kell Farm and assist in the arrangements for the erection of this barn and still?

A. Mr. Gettel gave me the assignment and I was instructed by him to report at the Kell Farm.

Q. And do what?

A. Conduct the investigation.

Q. And what else?

A. I was to assist Kell and whoever else participated in the erection of the barn and the still.

Q. And how were you to do that? How were you to assist him?

A. In whatever manner the operators requested.

Q. I see, and to encourage Kell to go along with whatever suggestions were being made by these men as well as Kell himself, right?

Mr. Waldron: I object to that as being leading and it is not material or rather there is no foundation shown as to the influence of this man over Kell. What difference would it make if a perfect stranger tried to influence Kell?

The Commissioner: But this man was not a perfect stranger. This man is an agent of the Government which has as one of its functions the investigation of violations of [fol. 65] the Internal Revenue Code and the initiation of prosecution for such violations. He testified that in his capacity as an agent of the Alcohol Tax Unit he received a specific assignment from his superior to go to the Kell Farm to conduct an investigation and to assist Mr. Kell and anyone else who was interested in putting up this still. Now, to say that this witness is a stranger is certainly carrying the idea, I think, to a rather remote point.

Mr. Waldron: May I have the question read.

(The following question was thereupon read by the reporter:

"Q. I see, and to encourage Kell to go along with whatever suggestions were being made by these men as well as Kell himself, right?")

The Commissioner: I don't see any objection to that question. He can answer yes or no. If he was told to encourage him then his answer might be Yes, and if he was told not to encourage him his answer might be No. I think he can answer the question. The answer might have an important bearing on this question of entrapment. Will you answer the question.

A. Do you mean was I instructed by my superiors to encourage Kell to go on with this?

Q. Yes, that is exactly what I mean.

A. Let me see—I am trying to think of any particular instances where I was instructed to encourage Mr. Kell.

Q. Just give us the truth, that's all.

[fol. 66] Mr. Waldron: Your Honor, how is this material? This man's association or encouragement of this man Kell? I fail to see the connection.

The Commissioner: What have you to say about that, Mr. Calandra?

Mr. Calandra: You have already ruled on the question and he is duty bound to answer it.

The Commissioner: Counsel has just raised a question. Let us have counsel's statement read, Miss Adler.

(The reporter thereupon read the remarks of Mr. Waldron.)

Mr. Calandra: It is very material. Here is a Government officer who has two duties to perform. One is to prevent crime and the other is to suppress it and we want to know, and we have a right to know, whether he encouraged this man or not, by the facts.

The Commissioner: I will permit the question and overrule the objection. Answer the question.

A: No, I was not.

Q. What were you told, Mr. Nilson, by any of your superiors or any of your co-associates——

Mr. Waldron: I object.

Q. —to say to Kell when you went there for this meeting?

Mr. Waldron: I will withdraw the objection.

A. I was introduced to Mr. Kell by Investigator Casey and I was not instructed by anyone as to what to say to Mr. Kell.

[fol. 67] Q. But you told Mr. Kell that you were an agent of the United States of America connected with the Alcohol Tax Unit, did you not?

A. Yes, sir.

Q. At the very first time that you met him.

A. Yes, sir.

Q. And did you tell him what your purpose was in being present there to work under the pretense of being a farm hand?

A. I personally didn't tell him that. I think Investigator Casey explained that to him.

Q. I see. In other words, you or Investigator Casey instructed Kell to let these fellows come on, rent this place to them, erect this barn and operate a distillery and Kell was not to say a word to anyone about it, just permit them to go right on and go through with this whole thing. Is that it?

A. Yes, sir.

Q. That was it. All right. How much money did Kell pay you?

Mr. Waldron: That was testified to before, and I object.

The Commissioner: No. He testified he was paid $100 a week by the people who operated the still if I recall. Am I correct in my recollection?

Mr. Calandra: That is correct.

The Commissioner: I don't think there has been any testimony thus far as to any compensation that was paid to the witness by Mr. Kell.

Mr. Waldron: Then I predicate my objection on the basis that it is immaterial to the issue.

Mr. Calandra: That is the issue now. It is most material to the issue of enticement and entrapment.

The Commissioner: I will allow it.

The Witness: May I have the question repeated.

[fol. 68] (The following question was thereupon read by the reporter:

"Q. How much money did Kell pay you?")

A. Kell paid me no salary.

Q. Was that by agreement and understanding?

A. Yes, sir.

Q. How much rent was Kell to get for the use and oc-

cupancy by these people of the premises assigned to them for the purpose of operating this still there?

A. He was to get $300 per month.

Q. Do you know whether that was paid to him?

A. Yes, sir.

Q. And for how many months did he receive the rent?

A. One.

Q. During all of the times that you were on the premises from the period when you started, when you were first introduced to Kell, up to and including the day following the raid, June 4th of this year, did you constantly confer with Kell?

A. Yes, sir.

Q. And did Kell ask your advice as to the many things that were going on there?

A. No, sir.

Q. Did you give Kell any instructions as to what he should or shouldn't do?

A. No, sir.

The Commissioner: This is off the record.

(Discussion off the record.)

Q. Was Kell deputized as an agent of the Alcohol Tax Unit?

A. Not to my knowledge.

Q. Did you keep a record of the daily production of this still?

A. Yes, sir.

Q. And what was the daily production of this still?

Mr. Waldron: I fail to see, your Honor, where this is material.

[fol. 69] Mr. Calandra: It is very important at nine dollars or ten dollars a gallon tax. It is very important.

Mr. Waldron: How is it important? The mere keeping of a record could hardly be connected with this violation that is charged on June 3rd.

The Commissioner: I will tell you, Mr. Waldron, there is one thing we should consider on this whole question of ruling on evidence. I am hearing this case now without a jury and for that reason I am very much inclined to permit the evidence to go in if there is an element of doubt as to its

relevancy, materiality or its competency and I think it does have some bearing on the subject and I will let him answer the question.

Mr. Waldron: I appreciate your stand, your Honor, in that regard but I still think your ruling imposes too great a burden on the Government, and I say that with all due respect. You are, in effect, ruling that we must establish our case by a preponderance of the evidence or beyond a reasonable doubt.

The Commissioner: No, I disagree with you. Mr. Calandra is now going into his defense, as far as this witness is concerned, and I think in a criminal proceeding he should be accorded fairly wide latitude in presenting evidence which bears on the case. I don't see how the Government will be prejudiced or how the Government will have any great burden imposed upon it by letting this particular question be answered. Of course, I can only deal with other questions as they come up.

Mr. Waldron: I will withdraw my objection.

The Witness: May I have the question repeated.

[fol. 70] (The following question was thereupon read by the reporter:

"Q. And what was the daily production of this still?")

A. The daily production was approximately ninety-four to ninety-eight five gallons per day.

Q. So that you would say between four hundred and five hundred gallons of illicit alcohol was being manufactured there per day.

A. Yes.

Q. And for what period of time?

A. Approximately three weeks.

Q. Approximately three weeks?

A. Yes.

Q. And was it a daily operation?

A. Yes.

Q. I see. And did you make those reports daily to Mr. Gettel or to any of your co-agents?

A. No, sir.

Q. When did you make your report to them?

A. Periodically I would manage to contact my superiors, at least once a week.

Q. I see, and when you did that you gave them the whole resume for the week.

A. Only verbally, sir.

Q. Yes, of course. And who was the superior you gave that information to?

A. Investigator-in-charge Gettel.

Q. I wish to take you back a moment, Mr. Nilson—I am sorry to jump like this—but at the time this agreement for rental was made at $300 per month, by whom was it made?

A. That I don't know, sir.

Q. Well, was it made by Ricciardelli, Roett, Trupiano? Were the three there at the time arrangements were made to rent the place at $300 per month?

A. As far as I know the arrangements were made with Mr. Roett, and that was only what Mr. Kell related to me.

Q. I see, but these other two men were there when the three hundred dollar arrangement was perfected, is that correct?

A. I can't say, sir, because I don't recall ever being present when the final arrangements were made or a price stipulated at $300 per month.

[fol. 71] Q. Who was talking about rent that the three of them, Roett, Trupiano and Ricciardelli were to pay? You say they were there discussing the figure as to the amount of rental they were to pay.

A. Yes.

Q. And they were all there together?

A. Yes.

Q. With Kell?

A. Yes.

Q. And you were just listening?

A. Yes.

Q. And each one had something to say as to the reasonableness or unreasonableness of the rent?

A. Principally between Ricciardelli and Mr. Roett.

Q. I see. They, in your mind, were the principals, you assumed that——

Mr. Walron: I object to that as calling for a conclusion.

The Commissioner: I think so.

Mr. Calandra: I am satisfied with a conclusion.

The Commissioner: I don't think it is for the witness to characterize who were the principals and who were the accomplices. I will sustain the objection.

Q. Incidentally, Mr. Nilson, on June 3, 1946 which is the day of the night of the raid, you were on the farm premises and at this barn practically all day and a good part of the evening, is that right?

A. Yes, sir.

Q. Did you come to Commissioner Goldstein for a search warrant?

A. No, sir.

Q. And you yourself assisted in the manner which you have described, starting with the erection of the still, in the framework, in the mixing of mash, helping to fill cans occasionally—you were there every day performing some work in aid of this illicit operation, is that right?

A. That's right.

[fol. 72] Q. And for which you were receiving $100 per week, is that correct?

A. Yes, sir.

Q. Where were you living at that time, where were you sleeping?

A. At the Kell Farm.

Q. And did you live at the little shack in the back that was built there?

A. I lived in the little house right adjacent to the Kell house proper.

Q. And you worked pretty hard there, didn't you?

A. At times.

Q. I know you did. That is all.

Cross-examination.

By Mr. Waldron:

Q. Mr. Nilson, when you first went upon the farm, did you offer to Mr. Kell any promise or reward or any payment of money for his cooperation in this case?

A. No, sir.

Q. Did you offer to any of the defendants any encouragement either by word of mouth or by payment of funds, to go on with the production of illicit alcohol?

A. No, sir.

Mr. Waldron: I have nothing further.

Mr. Calandra: I have nothing further.

Mr. Waldron: I have one other witness, if you please, Commissioner. I will now call Mr. Gettel.

OLIVER J. GETTEL, being first daily sworn in behalf of the Government, testified as follows:

Direct examination.

By Mr. Waldron:

Q. Mr. Gettel——

Mr. Waldron: Preliminary to examining this witness, your Honor, I would like a ruling on this one question of [fol. 73] law. I intend to establish the presence of one defendant, merely, by the testimony of this witness and I will ask you if you will restrict defense counsel on his cross-examination to the matters that I now adduce.

The Commissioner: Well, of course, my answer to your question has to be that I will limit the cross examination to the area covered by your direct.

Mr. Waldron: Thank you, sir.

The Commissioner: In other words, I will follow the established rules of evidence on that point.

Mr. Waldron: Thank you, sir.

Q. Mr. Gettel, what is your official position?

A. Investigator-in-charge of the Alcohol Tax Unit, Treasury Department, United States Government.

Q. And acting in such official capacity were you at the Kell Farm on the evening of June 3rd?

A. I was.

Q. Did you observe Frank Pugliese on the Kell Farm?

A. He came to the farm shortly after midnight June 3rd or early June 4th, 1946.

Q. What was he doing?

A. He, Pugliese, came in driving a truck loaded with bags of coke, a few more than fifty, and he was accompanied by Joseph Monticello. Pugliese was driving, and I apprehended them as they pulled up.

Mr. Waldron: That is all.

Cross-examination.

By Mr. Calandra:

Q. How far from the still house did you apprehend them, Mr. Gettel?

A. It was at the end of the trail. If you drive right up to the building it was about thirty-five feet.

Q. From the entrance of the farm building to the still?

A. Yes, sir.

Q. And they were both on the truck at that time?

A. Yes.

[fol. 74] Q. And that is all you saw them do is driving this truck.

A. Yes.

Q. And you placed them under arrest?

A. Yes.

Q. Did you question them as to their presence there?

A. Very little.

Q. What did you ask them?

A. I merely commanded them to get out of the truck and I took them into the still house and turned them over to the other investigators.

Q. Did you question them as to what they were doing there?

A. No.

Mr. Calandra: All right.

Now, if your Honor please, I ask that Mr. Kettel be called as my witness.

The Commissioner: Very well.

Oliver J. Gettel, being called as a witness in behalf of the Defendants, testified as follows:

Direct examination.

By Mr. Calandra:

Q. Mr. Gettel, when did you first learn that there was a still on the Kell farm?

A. Well, when it was being erected.

Q. How long before the raid, how long before June 3rd?

A. You mean from the first day of operation?

Q. Yes, that's right.

A. The first day of setting up the still was the first day of operation.

Q. I asked you before when you first learned there was going to be a still there and you answered when it was being erected. When was that?

A. The still was completed about three weeks prior to June 3rd, that is, ready for operation.

Q. And you obtained that information from an investigator, is that right?

A. That's right.

[fol. 75] Q. And who was that investigator?

A. Mr. Nilson.

Q. Was he the only agent that gave you such information?

A. That's right.

Q. And from that point on you had it under observation by other agents other than Mr. Nilson.

A. No, not from that point on, no, sir.

Q. How frequently did you get reports from Mr. Nilson as to what was going on in the barn, as to the operation and its production?

A. Periodically during that time and prior to that time. Approximately once a week.

Q. And you knew that finished product was coming out of there.

A. I did.

Q. And you knew, as well, how many cans, approximately, had been manufactured each week for the three week period before you decided to make the raid, didn't you?

A. That's right.

Q. Did you get a search warrant?

A. No, sir.

Q. Did you instruct any of your officers to get a search warrant?

A. No, sir.

Q. Did you ever talk with Kell?

A. Yes, I talked to Kell the day of the raid.

Q. Did you ever talk with him before that?

A. Yes, I did.

Q. When?

A. On several occasions.

Q. Give us the dates of those occasions, please.

A. From memory I can't be accurate in giving those.

Q. All right. The last time before the day of the raid when did you see him?

A. Oh, about two weeks prior to that.

Q. So you hadn't seen him for two weeks until the day of the raid.

A. That's right.

Q. And where did you see Kell?

A. I saw him around the still house and at the farm house and around the farm.

Q. You were on the still premises two weeks before?

A. I thought you referred to the day of the raid.

[fol. 76] Q. No, where did you speak to Kell two weeks before the raid?

A. Down in the country, away from the farm.

Q. Away from the farm?

A. Yes.

Q. And what did you talk about?

A. I didn't talk too much to him.

Q. Well, what was the purpose of the meeting?

A. Just to talk this case over, to talk about what was going on there.

Q. I see, and he was giving you information.

A. No, he didn't give me much information.

Q. Well, were you giving him much information?

A. None.

Q. You said you talked to him about this case. Explain your answer, if you will, please.

Mr. Waldron: I object to this line of questioning. Kell is neither a defendant nor is he here to be questioned and Mr. Calandra has permission to call Mr. Kell.

Mr. Calandra: We will.

The Commissioner: I think it goes to the question as to whether or not the Government by any act or acts on its part induced or enticed the defendants to engage in this alleged illegal enterprise and that inducement or enticement could have been made through Mr. Kell, perhaps. I don't, of course, say it is so but I think counsel is entitled to probe into that question to find out whether or not the Alcohol Tax Unit, through Mr. Gettel, did tell Mr. Kell to do this, that or the other thing, and I think it is evidential on that score.

Mr. Waldron: I will withdraw my objection on that ground. May I point out that no foundation has been laid as yet between Kell and Gettel and the defendants.

[fol. 77] Mr. Calandra: I am getting to that. Mr. Gettel doesn't remember without benefit of his notes and I am trying to help him remember, don't you see.

Mr. Waldron: I will withdraw the objection.

The Commissioner: I assume in reference to any line of testimony that has to be connected up in order to be inte-

grated properly in the record that it will be so connected up and if it is not so connected you may reserve your right at the proper time to move to strike any portion of the testimony. I think that where counsel states, however, that he will connect it up, I believe we have a right to assume that he will do so.

Mr. Waldron: Under those circumstances I am agreeable.

The Witness: May I have the question repeated.

(The following question was thereupon read by the reporter:

"Q. You said you talked to him about this case. Explain your answer, if you will, please.")

A. Well, Mr. Nilson came out to report to me and Mr. Kell was along with him but I had not asked for Mr. Kell to come along and there was very little said to Kell. I talked to Mr. Nilson quite a bit about the case.

Q. In the presence of Kell?

A. Kell couldn't hear what I was talking to Mr. Nilson about. I bid him the time of day, that is Mr. Kell, and I just spoke generally to him but not about this case and not having reference to this case even.

Q. I see. That was two weeks prior to June 3rd, about?

A. That's right.

Q. Now, the time previous to that, when did you see Kell and where?

A. Oh, that was some months before.

[fol. 78] Q. Where did you see Kell?

A. I believe at his farm.

Q. Was that before the still went in?

A. That's right.

Q. Was that the time that Mr. Nilson was instructed to got to work on the farm as a farm hand?

A. No, sir.

Q. Well, when was that?

A. It was several months ago. I would have to look at my notes to be able to give you the exact date.

Q. What was the subject of conversation between you and Kell at that time?

A. I was informed at that time by Mr. Kell that certain individuals had been to see him again and were desirous of placing or erecting a still upon his premises and operating it.

Q. And what did you tell Kell?

A. I told him that it was up to him.

Q. Did you tell him to go ahead and make the arrangements?

A. Not to make any arrangements whatever.

Q. What was up to him?

A. Whether or not to accept the proposition that was extended to him by those operators.

Q. Well, didn't you tell him who you were?

A. Yes, he knew who I was, certainly.

Q. And did you tell him that you were a Federal enforcement officer and that he should not accept any proposition whereby an illicit still could be put on his farm?

A. No, sir, I didn't instruct him along that line.

Q. You didn't tell him not to go through with such a proposition, that it was in violation of the law and that he could get in trouble?

A. No, sir. I told him that if he did so and wanted to work with the Government that the Government would be with him.

Q. In other words, you mean to tell us that you said to Kell, "Now go ahead and let them put the still on the farm and you work with us and supply us with the information, and if you are with us nothing will happen to you," [fol. 79] did you tell him that?

A. He was doing it for the United States Government.

Q. And you encouraged him to go ahead.

A. I didn't encourage him at all.

Q. You didn't tell him not to do it, did you, Mr. Gettel?

A. No, I didn't tell him not to.

Q. Then you did tell him to go ahead and do it and be with Uncle Sam.

Mr. Waldron: I object. He is arguing with the witness, if the Commissioner please.

The Commissioner: Let us all be mindful of the fact that this is your witness.

Mr. Calandra: I am sorry, sir.

Q. You didn't stop him from going ahead with the carrying out of any arrangements that he had for renting this place and permitting this illicit operation going on, did you?

A. I didn't.

Q. You permitted him to go right ahead with the agree-

ment that he would keep you informed and have Nilson there as a farm hand, Mr. Gettel?

A. Nilson was not discussed at that time.

Q. I see. When did Nilson come into the picture? Was that after you talked with Kell that if he wanted to be on the side of the Government——

A. He came in on one of the occasions when I talked with Mr. Kell.

Q. What occasion was that?

A. I think I told you that I don't have my notes and I can't tell you accurately when it was.

Q. Give us your best recollection. You have given us June 3rd as a day when you saw Kell, and you said you saw him two weeks before that, that you met him in the country with Nilson——

A. Yes.

[fol. 80] Q. —and the next previous occasion was some couple of months before when you got this information that some people had approached him to set up a still on his property, right?

A. That is right, that is substantially correct.

Q. And you told him to go ahead and let these fellows come in there.

A. If they came to him for that purpose, yes.

Q. To go ahead, right?

A. Not for him to go ahead but to let them go ahead.

Q. But it was his property.

A. Yes.

Q. And they couldn't go ahead on his property without his permission.

A. Not without coming to him.

Q. And you gave him the green light.

A. As far as we were concerned, and he was to keep us fully advised.

Q. And at the 'go ahead' conversation that you just mentioned, at that time, there was not a barn or a still or a vat or a drop of alcohol yet manufactured or set up in operation.

A. No.

Q. There was nothing set up, is that right?

A. Nothing, only an offer.

Q. Made by whom to whom?

A. To Mr. Kell.

Q. By whom?

A. I didn't know at the time who made the offer.

Q. He didn't give you the names, I suppose.

A. No, he didn't.

Q. He probably didn't know that himself.

A. That I couldn't say.

Q. And that was the arrangement, agreement and understanding, that you had with Kell, is that right?

A. That and on prior occasions, yes.

Q. Now, when was the occasion prior to the two month lapse, the occasion previous to the one you just talked about?

A. I said I met him several times along that line but I can't give you the exact dates.

[fol. 81] Q. I am not asking for the exact dates but I am asking you to give us the approximate time. Just give us the conversations, all of them, that is what I am asking you.

A. That is all I recall.

Q. And you met him several times previous to the go ahead time that you spoke of. Where did you meet him?

A. I met him at the farm two or three times.

Q. And there was no barn or still there at that time.

A. No.

Q. What was your reason for meeting him so many times on this farm?

A. I had information that they had made this offer to him to put a still on his farm.

Q. Did you at any time instruct him not to go through with it because he would be violating the law?

A. No.

Q. Did you deputize Kell as a Federal agent from the first time you met him?

A. I don't know what you mean by that.

Q. Did you swear him in as an agent?

A. No, sir, I did not swear him in as an agent.

Q. Do you know whether he is an agent of the United States Government?

A. I cannot swear to it but he is not to my knowledge.

Q. He is not?

A. Not to my knowledge.

Q. Who introduced Kell to you?

Mr. Waldron: I object to that question, if your Honor please, as not being material.

The Commissioner: What difference does it make who introduced him? I can't see that it has any relevancy and I will sustain the objection.

Mr. Calandra: Just one more question.

Q. You are in charge of this case, are you not?

A. No, sir.

[fol. 82] Q. Who is?

A. That is, no longer. The main office is in charge of it.

Q. I mean so far as New Jersey is concerned.

A. Mr. Bolan at the main office.

Q. The assistant supervisor?

A. Yes, he is in charge of it.

Q. Has Kell been arrested and charged with a violation of the Internal Revenue laws committed by him as a direct aider and abetter, on his farm?

Mr. Waldron: I object to that.

The Commissioner: I will sustain the objection.

Mr. Calandra: Exception.

Q. Will Kell be arrested and charged with the violation of the Internal Revenue laws committed on his farm, the same as these defendants now standing before this court?

Mr. Waldron: I object to that as being immaterial.

The Commissioner: Is that the only ground for your objection?

Mr. Waldron: And on the further ground that it is irrelevant and not in issue and that it calls for a future action over which we have no control and upon which future investigation must be made before we can come to that conclusion.

The Commissioner: I asked that question of you, Mr. Waldron, because if you objected only because it was immaterial I would have to overrule the ob-ection but on the basis of your restated objection I will sustain the ob-ection.

Mr. Calandra: Exception.

Q. Mr. Gettel, did you have a talk with any of the other defendants who are arraigned here today before the Bar?

[fol. 83] A. No, outside of bidding them the time of day. In other words, you might say, "How do you do," or something like that. Mr. Roett wanted to talk to me but he had nothing to say.

Q. Was there anything said?

A. Very, very little was said.

Q. Do you recall anything he said, or any of the other men?

A. I believe he asked Mr. Van De Car if he could talk to the boss and Mr. Van De Car said that I was boss and I said, "If you have anything to say, you can say it now, these are my buddies."

Q. And he wouldn't say anything.

A. He wouldn't say anything.

Mr. Calandra: That is all.

Mr. Waldron: No cross. We have no further witnesses.

Mr. Calandra: If that is the Government's case I will not take up your Honor's time with respect to certain of the defendants, with the exception of two. I might state this argument is off the record.

. . . . . .

Mr. Calandra: Is Mr. Kell here? I subpoenaed him through the United States Marshal's office, Commissioner.

The Commissioner: I don't know.

Mr. Waldron: Yes, he is here.

[fol. 84] COPELAND KELL, being first duly sworn in behalf of the Defendants, testified as follows:

The Commissioner: Where do you live, Mr. Kell?

The Witness: Allenwood, New Jersey.

Direct examination.

By Mr. Calandra:

Q. What is the correct address, Mr. Kell?

A. My farm is in Allenwood, Wall Township and the post office is Box 733.

Q. Mr. Kell, you were subpoenaed to be here by the United States Marshal's office?

A. Last night.

Q. A subpoena was served upon you?

A. Yes, sir.

Q. Are you the owner of the farm located at the address you have just given to us?

A. That's right.

Q. And how long have you owned that farm?

A. Approximately three years.

Q. What type of a farm is it? What do you do there? What do you farm?

A. I engage in general farming.

Q. General farming?

A. Yes.

Q. How many acres do you have?

A. Approximately one hundred.

Q. Did you own this farm on June 3, 1946?

A. I did.

Q. And did you own this farm or were you the owner of this farm for approximately five months prior to June 3, 1946?

A. I was.

Q. Do you recognize Mr. Riordan Roett——

A. I do.

— —in this room?

A. Known to me as Mr. Johnson.

Q. Mr. Johnson?

A. Yes.

Q. Did you meet with him at your farm in January, February, March, April, May or June of this year?

A. I am positive of all those months except January and I believe I did meet him in January.

[fol. 85] Q. Where did you meet him in January 1946?

A. He came to the house.

Q. He came to your house?

A. Yes.

Q. And your house is situated right on the farm property?

A. That's right.

Q. And who was with him, if anyone?

A. I don't know who was with him but he had somebody in the car.

Q. Did he talk with you?

A. Yes.

Q. Who was present when he talked with you, besides you and he?

A. At the conversation?

Q. Yes.

A. We were alone. Mrs. Kell was in the next room.

Q. Were you talking softly?

A. Not necessarily.

Q. Do you know of your own knowledge whether Mrs. Kell could hear what the conversation was between you and Mr. Roett, also known to you as Mr. Johnson?

A. I don't know. Possibly she got snatches of the conversation.

Q. What was the conversation, Mr. Kell?

A. Johnson wanted to rent a part of the farm.

Q. For what purpose?

A. He didn't say.

Q. He didn't say.

A. Not in so many words. He was not explicit and that raised by suspicions.

Q. And that was in January 1946?

A. Yes.

Q. And did you come to any terms or understanding at that time, and I am speaking of the first meeting in January 1946, with Mr. Johnson.

A. Did I come to any terms?

Q. Yes.

A. I was suspicious of him and I came to no terms.

Q. Did you see him after that?

A. Yes.

Q. Where did you see him?

A. On the farm.

Q. Who was with him?

A. I am not positive who was with him at the next meeting.

Q. How long after the first meeting did you see him the second time or the second meeting?

[fol. 86] A. For the record, I have made a mistake about the second meeting. I didn't meet him at the farm.

Q. Where did you meet him?

A. He came to the farm and Mrs. Kell sent him to Point Pleasant where I was at that time.

Q. And you were alone?

A. Yes.

Q. And did you talk to him again?

A. Yes.

Q. And what did you talk to him about?

A. He urged me to rent him a section of the farm on which he could erect a building.

Q. And did you agree with him then?

A. I did not.

Q. Why not?

A. Because I didn't feel that I should do it.

Q. What was the conversation about and why didn't you feel you should do it and just what do you mean by "it"?

A. To rent the building. I was still suspicious.

Q. And because you were suspicious of what business might be conducted in this barn you want us to understand that you didn't come to any terms with Mr. Roett, whom you know as Johnson.

A. I didn't come to any terms at that meeting.

Q. I see. And how long after the first meeting in January did the second meeting take place?

A. My mind is not quite clear on that, possibly several weeks.

Q. Several weeks,

A. Yes.

Q. Now, did you, after your first meeting in January with Mr. Roett, did you convey your suspicions to anyone? Did you mention it to anyone or discuss what your suspicions were with anyone?

A. I discussed it with Mrs. Kell and I was also so suspicious that I got in touch with an agent of the Federal Alcohol Tax Unit.

Q. Who was that?

A. Homer Casey.

Q. When was the first time you got in touch with Homer Casey?

A. I don't remember.

[fol. 87] Q. Was it immediately after the first visit?

A. No.

Q. Was it immediately after the second meeting with Mr. Roett whom you know as Johnson?

A. No.

Q. How long after the second meeting where you did not, as I understand you, come to terms with Mr. Roett, did you talk to Mr. Casey?

A. The exact time I don't know.

Q. Give it to us in point of weeks or days.

A. Several—possibly a week.

Q. Possibly a week later?

A. Yes.

Q. And at that time you had come to no understanding or arrangement with Mr. Johnson for the renting of any

part of your farm for the purpose of erecting a building there, is that correct?

A. I had come to no agreement with him.

Q. Yes. Now, when was the next time after the second time that you saw Mr. Roett whom you knew as Johnson?

A. The meeting took place at the farm but as to when it was I can't tell you. He came in many times.

Q. On this first or second occasion did he tell you exactly what business would be conducted in this building that was proposed to be erected there?

A. During our various meetings?

Q. I am speaking now of the first and second meeting.

A. It was not mentioned explicitly.

Q. You didn't know exactly what he was going to put there, is that right?

A. There was room left for my imagination.

Q. But nothing was said specifically.

A. Not definitely.

Q. In other words, if I understand you correctly, it was left to your imagination as to what would transpire in this building.

A. Yes, in the first and second meetings. That is so.

Q. Yes, and the third meeting was held, you say, a week after the second meeting.

A. Approximately.

[fol. 88] Q. Yes. And who was with Mr. Johnson at that time?

A. I don't know.

Q. How many people were with him?

A. I don't know.

Q. Will you please look around this room and if there is anyone here you recognize don't hesitate at all to identify them.

A. At any specific meeting?

Q. We just want the true facts.

A. Shall I identify anybody that was there at the third meeting? Is that what you want?

Q. Yes, sir.

A. I am unable to do that. My mind is too confused as to who was with him at that time. He came in so many times with people and so to pin it down to the third visit I couldn't do that.

Q. I see. Now, at the third visit was anything definite discussed as to the erection of the building and the supposed business to be operated therein, Mr. Kell?

A. Those discussions—the main thing discussed was the man's requirements.

Q. Explain that, please.

A. He had certain requirements for the usefulness and the location of the building.

Q. What were they?

A. One was access, the road. Another one was that he needed a quantity of water, and those matters came up for discussion during those meetings.

Q. And during those meetings—you are now referring to the meetings after the third meeting, and including the third meeting, wherein several other people were with him.

A. Those matters were all discussed at all these meetings.

Q. I see. Now, when these matters were discussed at all these meetings, with reference to the requirements, do you now recognize, in this room, any person or persons and I want you to identify them without any fear or favor, Mr. Kell, any person or persons that were present, talking with you and Mr. Roett, who you know as Johnson.

[fol. 89] A. I am to identify anybody who was there at any time, during any of those meetings?

Q. Yes.

A. And they extended over two or probably three months.

Q. Yes. Do that, please.

A. I recognize Mr. Roett. Tony.

The Commissioner: Tony who?

The Witness: I knew him as Tony.

Mr. Calandra: Antoniole.

A. And Dominick; the man next to him.

Q. Ricciardelli. You knew him as Dominick?

A. Yes. And this man, Jack.

The Commissioner: Trupiano?

The Witness: Yes.

Q. All right. Now, each of the men whom you have just identified participated in conversations with you relating to the requirements, their requirements, is that correct?

A. That is correct.

Q. And each of them took an interest in explaining to you exactly what their requirements would be, Mr. Kell?

A. Yes.

Q. Yes, and did you come to any definite, conclusive understanding with these men? I am now referring to Mr. Roett, Mr. Trupiano, Mr. Antoniole and Mr. Ricciardelli whom you identified as Dominick.

A. Your question is, did I come to any definite agreement with them?

Q. Yes.

A. Eventually, yes.

Q. When did that come about, Mr. Kell?

A. I don't know the date.

Q. Approximately?

A. Approximately toward the end of March.

Q. Toward the end of March?

A. Yes.

[fol. 90] Q. And what arrangements, agreement and understanding did you come to with Mr. Roett, Mr. Trupiano, Mr. Antoniole and Mr. Ricciardelli?

A. I agreed to allow them to use the property. They were to build a building suitable to them and to some extent suitable to me.

Q. And what was that to be?

A. The building was to be of a certain specific height and square footage and area, and they also required a quantity of water.

Q. And how was that arranged for?

A. They arranged to locate a well driller and drill a well.

Q. And that was to be at whose expense?

A. Their expense.

Q. And you mean these four men whom you have identified a few moments ago.

A. My business dealings were all with Roett.

Q. But these three men were present at the time.

A. Yes, acting in the capacity of technicians.

Q. And they participated in the discussions with you relating to their requirements as to water, roads, and so forth.

A. That is correct.

Q. Who called the well driller in, Mr. Kell?

A. Mr. Roett.

Q. Did you recommend the well driller?

A. No.

Q. Do you know who the well driller was?

A. I never heard of him before he came to the property.

Q. You didn't call him, in any event.

A. I didn't call him.

Q. And what agreement was made between you and these four men relating to the rental, if any, that you were to be paid for the use and occupancy of a part of your premises?

A. Do you want to know the agreement?

Q. Yes.

A. They agreed to pay a rental of $300 a month.

[fol. 91] Q. And that was agreed upon between you and these four men, Trupiano, Roett, Antoniole and Ricciardelli whom you know as Dominick.

A. It was agreed upon between me and Roett.

Q. And these other three men were present at the arrangement.

A. They knew of it. We were all there together.

Q. Yes. Did you ask for a lease or was one offered to you?

A. One was offered to me.

Q. Did you get a lease?

A. Eventually.

Q. Who gave it to you?

A. Roett.

Q. And to whom was the lease made?

A. Copeland Kell.

Q. And who was the tenant?

A. One—I don't remember the name.

Q. Do you have the lease?

A. Not with me, no.

Q. Who has it?

A. I don't know just what happened to it. It was of no value and it wasn't legal in a court of law, and I didn't pay attention to it.

Q. Did you give it to anybody?

A. No.

Q. Did you give it to Mr. Casey?

A. No.

Q. Did you give it to Mr. Gettel?

A. No.

Q. Or to Mr. Van De Car?

A. No.

Q. Or to any Federal agent?

Mr. Waldron: I object to that as leading. This man is his witness.

Mr. Calandra: I am asking direct questions.

Q. Did you give it to anyone connected with the Federal Government?

A. No.

Q. Now, I wish to bring your mind back and I want you to be completely orientated so that you can fairly answer the question. Prior to the final meeting whereat the rental was agreed upon, did you communicate to any Federal [fol. 92] officer what you had discussed with these men, these four men?

A. I would like the question repeated.

(Question read to the witness.)

A. The answer is yes.

Q. When?

A. I don't know the date.

Q. When did you first discuss with Homer Casey anything pertaining to Mr. Roett, known to you as Johnson, and these other gentlemen whom you have identified?

A. I cannot give you the date.

Q. How long before the latter part of March 1946?

A. Mr. Casey came to see me in March and I informed him.

Q. How did he come to see you, if you know.

A. I don't know.

Q. Did you send for him?

A. I sent word to him.

Q. That you wished to speak with him?

A. That's right.

Q. And he came to your farm?

A. Yes.

Q. And he came to your house?

A. Yes.

Q. Did you know at the time that you sent for Mr. Casey, and I am speaking of the event we are now discussing, that a still was going to be erected in the barn?

A. Yes.

Q. You knew that and you told that to Mr. Casey, correct?

A. Definitely, I told him.

Q. And that was before any road or barn building was erected by these people on your farm, wasn't it?

A. Yes, sir.

Q. And Mr. Casey introduced you to another gentleman, didn't he, by the name of Oliver J. Gettel?

A. On one occasion Mr. Gettel was with him, yes.

Q. And you were introduced to Mr. Gettel by Homer Casey, weren't you?

A. That's right.

Q. And he introduced Mr. Gettel to you as a Federal officer, right?

A. Yes.

[fol. 93] Q. And as his superior, as Mr. Casey's superior.

A. That's right.

Q. And at the time of that introduction there was not a thing done on the farm by any one or all of those four men whom you have identified here this morning, was there, Mr. Kell?

A. That is correct.

Q. Yes, and was it after the meeting with Mr. Gettel that you acquired a new cousin by the name of Nilson, who was known as Ben?

A. After the meeting with Mr. Gettel.

Q. Yes.

A. Yes.

Q. What was your conversation with Mr. Gettel? What did you say to him and what did he say to you? That was at the very first meeting and at the very first introduction.

A. I don't remember.

Q. Did you tell Mr. Gettel what your suspicions were?

A. I didn't have to.

Q. Did Mr. Gettel tell you?

A. What my suspicions were?

Q. Yes.

A. No, I had made my report to Homer Casey.

Q. What report did you make to Homer Casey?

A. I merely told him of my various meetings.

Q. And that the barn was going to be erected and that a still was to be set up in the barn?

A. Yes.

Q. And it was after that that you met Mr. Gettel.

A. After I reported to Casey.

Q. Yes.

A. That's right.

Q. Did Mr. Gettel tell you to go ahead and permit these men to erect this barn and to go ahead with the still operation and accept the $300 a month rental and to permit them to put in this well, at that first meeting?

A. Mr. Gettel told me that providing I did nothing to entice them and encourage them in their going ahead with their plans it was all right for me to accept their agreement.

[fol. 94] Q. I see. What does "entice" mean, Mr. Kell?

A. I don't know—you can look it up in the dictionary.

Mr. Waldron: I think the witness should be qualified as an expert first.

Mr. Calandra: He uses the words "entice" and "encouragement."

Mr. Waldron: Yes, and he should be qualified as an expert if you are going to interrogate him on their meaning.

Mr. Calandra: He said he didn't know what it meant and that I should look in the dictionary.

Q. Do you know what "encouragement" means?

Mr. Waldron: I object.

The Commissioner: He can ask the witness what he understands the words "entice" or "encouragement" to mean. His definition may be wrong but every person has his own conception of what a particular word means.

Mr. Waldron: I will withdraw my objection.

A. I will be glad to qualify that. I would say the word "entice" means to lead on, encourage.

Q. And how did Mr. Gettel tell you to act and what did he tell you to say — Mr. Roett, alias Johnson, and these other men, at that first meeting with Mr. Gettel?

A. Mr. G[illegible] didn't tell me what to say.

Q. But he told you to go along with the Government.

A. Yes.

Q. And did he tell you that by going along with the Government that nothing could happen to you, that you couldn't or wouldn't be prosecuted?

Mr. Waldron: I object. That is not an issue at this time.

[fol. 95] Mr. Calandra: I am quoting Mr. Gettel. That was his testimony. Mr. Gettel said that and I am asking him what Gettel told him.

Mr. Waldron: Still what Gettel and this man said must be material to the issue. If an objection was not interposed

to what Mr. Gettel said at that time that was my fault but the testimony should not be permitted to go miles afield.

The Commissioner: I think that is true, Mr. Calandra. I think the witness has answered your specific question and I don't think it makes much difference what Mr. Gettel told this witness would happen to him.

Mr. Calandra: I will withdraw the question.

Q. What were Mr. Gettel's instructions to you after you had discussed with him this plan that these four men were going to erect a barn and therein operate a still?

A. His instructions were merely to keep Mr. Casey informed of developments.

Q. I see. Did Mr. Gettel say to you, "Now, Mr. Kell, you chase them away. Don't have anything to do with these people because by your permitting, your knowingly permitting a barn or still to be erected on the premises that you would be aiding and abetting in the commission of a felony or a crime against the Internal Revenue Laws of the United States of America"?

Mr. Waldron: I object to that as being leading. This witness is Mr. Calandra's own witness.

The Commissioner: Yes, I will sustain the objection.

Mr. Calandra: It merely requires a yes or no answer.

[fol. 96] Q. Did Mr. Gettel say to you anything at all relat- these people because by your permitting, your knowingly ing to the fact that any activity on your part would be understood by him and Homer Casey, the government agents?

A. I don't know what you mean by "understood."

Q. Did Mr. Gettel or Mr. Casey say to you, "Permit them to go ahead but don't tell them that you had spoken to me or to Homer Casey"?

. . . . . .

(The following question was thereupon read by the reporter:

"Q. Did Mr. Gettel or Mr. Casey say to you, 'Permit them to go ahead but don't tell them that you have spoken to me or to Homer Casey' "?)

The Commissioner: I will sustain the objection.

Q. What were Mr. Gettel's instructions to you?

Mr. Waldron: I object. He has testified to that.

The Commissioner: I think he is right. I believe Government's counsel is correct.

Q. What were Mr. Casey's instructions to you?

A. To keep him informed of developments.

Q. Did he tell you not to permit them to erect this barn or to permit them to put a still in there?

A. No.

Q. And at the time that you agreed to accept $300 a month rent from these four men for the use and occupancy of your farm you knew then that they were going to put a still in there and manufacture alcohol, did you not?

A. I did.

Q. And you reported that fact to Mr. Casey?

A. I did.

Q. And did you report that fact to Mr. Gettel?

A. Not to Mr. Gettel personally.

[fol. 97] Q. I see, and that was all reported by you, this rental agreement by these four men with you, to Mr. Casey, before the barn went up, before the still was set up and before the road was made and before the well was dug, is that right?

A. The agreement about the rental?

Q. Yes.

A. Your question refers to the agreement about the rental.

Q. In other words, you first agreed on the rent before they did a single thing in there, is that correct?

A. Yes.

Q. All right, and did you receive the rent?

A. No, not at that time.

Q. When did you first receive the rent?

A. Not until several months later.

Q. How much rent did you receive?

A. It was made in two payments. One during construction to aid in the construction and the last payment of $150 was made after the still became profitable.

Q. So in all you received but $300 in rental?

A. That's correct.

Q. Did you go down to the barn yourself to see how it was being constructed?

A. I aided in its construction.

Q. I see, why did you do that?

A. To get it the way I wanted it. I had that interest at heart.

Q. Did you tell that to Mr. Casey, that you were going to help erect the barn?

A. Yes.

Q. You did. All right. And was part of the arrangement with you, this rental arrangement, that when these people would move out of there the barn would be your property?

A. It wasn't discussed.

Mr. Waldron: I object. It is immaterial.

Mr. Calandra: He says the question never came up.

[fol. 98] Q. With reference to the well, what discussion was there with reference to the well?

A. The main concern was as to whether or not it would produce enough water.

Q. And did you think it would?

A. I didn't know.

Q. Now, you knew Mr. Nilson?

A. Yes.

Q. He is a Federal officer, is he not?

A. Yes.

Q. When did you first learn he was a Federal officer, Mr. Kell?

A. The first day he came to my house.

Q. When was that?

A. About the middle of February, I believe.

Q. And at the time neither of the four men had done any work in there in connection with the erection of the barn or setting up the still or making the road or the well, is that right?

A. No work was done.

Q. Did you have any talks with Nilson?

A. Yes.

Q. In February?

A. Yes.

Q. And who introduced you to Nilson?

A. Homer Casey.

Q. And what arrangements did you make with Nilson and Casey, if any?

A. The arrangements—I don't understand the question.

Q. What talks did you have with Casey and Nilson when you were first introduced to him?

A. Very little.

Q. Well, what did Nilson say to you—I will withdraw that. What did Casey say to you when he introduced you to Nilson?

A. I told Homer Casey that I was short of help and he told me, "Here is your new farm hand."

Q. And what name did he give you?

A. He told me it was Ben.

Q. Ben what?

A. He didn't give the last name, I don't believe.

Q. He told you then that Nilson was a Federal agent?

A. I don't believe he did.

[fol. 99] Q. How long after the first introduction did he tell you that Ben, the man who you were introduced to as Ben and whose right name is Nilson was, in fact, a Federal officer?

A. I am not sure he ever told me that in so many words.

Q. Were you told by anyone to introduce or to pretend that Nilson was a cousin to your wife?

A. I was never told to say that.

Q. Now, Mr. Nilson testified here two weeks ago that he was introduced to these men as a cousin of Mrs. Kell.

A. Yes.

Q. That is what he testified to here, under oath.

A. And that is definitely right. I introduced him that way but I wasn't told to do that.

Q. That was your own idea?

A. Yes.

Q. Did he work on the farm?

A. He sure did.

Q. For you?

A. That's right.

Q. Before any of these men came there to start this operation.

A. To start construction?

Q. Yes, to dig the well and start construction of the barn.

A. Yes, some time before.

Q. And what did he do for you?

A. Driving the tractor and hauling logs, and so on.

Q. Did you pay him?

A. I didn't.

Q. How long did he work for you as a farm hand before he quit you and went to work in this still, meaning Ben or Nilson?

A. Several weeks. Four or five weeks, possibly.

Q. And did it seem peculiar to you, Mr. Kell, to have a person work for you, drive a tractor and work on the farm all day, and not pay him?

Mr. Waldron: I object.

Mr. Calandra: I will withdraw the question.

Q. Did you agree when you hired Ben, alias Nilson, to pay him wages to work for you as a farm hand?

A. May I have the question repeated?

[fol. 100] (Question repeated.)

A. No.

Q. Why not, Mr. Kell? Come on, let's have it; we are looking for the truth no matter whom it hurts or helps. We can't help that.

A. I was never asked to pay him.

Q. Well, don't you pay your farm hands?

Mr. Waldron: I object to that as being immaterial whether or not this man pays his farm hands.

The Commissioner: Objection sustained.

Q. Who didn't ask you to pay him?

A. Who didn't ask me to pay him?

Mr. Waldron: I object to that as being immaterial.

Q. Who asked you not to pay him?

Mr. Waldron: Same objection.

The Commissioner: Objection sustained. I don't think that is in issue.

Q. As a matter of fact, he worked for you several weeks and he wasn't paid for that work by you.

Mr. Waldron: I object. This was all testified to before.

Q. When did he cease working for you as a farm hand?

A. I couldn't give you the exact date.

Q. Approximately.

A. The date when the still went into operation.

Q. Did he assist in the construction of the barn?

A. Yes.

Q. Did he assist you or did he assist these other boys whom you have identified here?

[fol. 101] A. In as much as he was living with me and had been helping me as a member of the family, he was there working for me, to look after my interests.

Q. You say, "as a member of the family." Explain that, please, that is not quite clear to my hazy brain this morning.

Mr. Waldron: I object.

The Commissioner: Objection sustained.

Q. In other words, he was a member of your family and he took an interest in seeing that the barn was constructed properly, is that correct?

A. That is correct.

The Commissioner: Can't you pin this thing down to specific facts, Mr. Calandra, of entrapment?

Mr. Calandra: I am leading up to that very quickly, Mr. Commissioner.

Q. For how long a period of time did you agree to rent that portion of your farm that was to have a barn erected on it and have a still in it, to make this illicit alcohol?

A. That agreement had no time limit.

Q. It was indefinite?

A. Indefinite. I do believe it was mentioned in the lease but the lease was not legal.

Q. You say the lease was not legal. Who told you that, Mr. Kell?

Mr. Waldron: I object.

A. Mr. Roett.

Q. Mr. Roett told you it was not legal?

A. That's right.

Q. But nevertheless you recognized these four people as your tenants and accepted the rental for the use and occupancy of your farm.

A. Yes, sir.

[fol. 102] Q. That's right. How many times had you spoken with Mr. Homer Casey? I will withdraw that. How many times had you spoken with Mr. Gettel since your first introduction?

The Commissioner: What difference does it make how many times he spoke to him? As I said before, we are not going into a trial here. Let us work on the assumption, which is borne out by the testimony, that he told Mr. Gettel once or twice or even ten times. What difference does it make? We can, I think, acknowledge the fact that the Government knew what was going on and knew it at various times from this witness but what difference does it make?

Q. And do you acknowledge that Mr. Gettel and Mr. Casey knew, Mr. Kell, prior to the erection of the barn exactly what was going to go on in there?

The Commissioner: He also testified to that. He said that Mr. Gettel knew.

Q. All right. Mr. Kell, did you know that you were violating the laws of the United States as well as the laws of the State of New Jersey by permitting, with your knowledge, a still to be operated on your property?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Have you been arrested in this case at all, Mr. Kell?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Do you know you are subject to indictment and trial for your activities in connection with knowingly permitting [fol. 103] this illicit still to not only be erected but be operated on your farm and to be prosecuted by both the United States and the State of New Jersey, the same as these other men?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Were you deputized or sworn as a Federal officer by Mr. Gettel or Mr. Casey or any other Federal officer?

Mr. Waldron: I object.
The Commissioner: Objection sustained.
Mr. Calandra: That is a proper question.
The Commissioner: Why?
Mr. Calandra: Nilson went in there on this set up and we have a right to know it. Of course, Mr. Gettel said Mr. Kell had not been deputized and it is a perfectly innocuous question.
The Commissioner: I will allow it.
Mr. Calandra: May I have the question repeated.

(The following question was thereupon read by the reporter:

"Q. Were you deputized or sworn as a Federal officer by Mr. Gettel or Mr. Casey or any other Federal officer?")

A. No.

Q. Did you have any arrangements or agreements, and this requires a yes or no answer, with Mr. Gettel, Mr. Casey, Mr. Van De Car or Mr. Nilson, relating to what you were required to do as these men were erecting the barn and setting up the still and operating the still?

Mr. Chauncey Spering: I am the Special Investigator assigned to this case from Washington and I have just been sitting here and I have come to the conclusion that all Mr. Calandra is trying to do is to get the Government's case.

[fol. 104] The Commissioner: And you have his case, too.

Mr. Spering: We have a case, we don't need his case.

The Commissioner: Is there a question on the record and if there is what is the question?

(The following question was thereupon read by the reporter:

"Q. Did you have any arrangements or agreements, and this requires a yes or no answer, with Mr. Gettel, Mr. Casey, Mr. Van De Car or Mr. Nilson, relating to what you were required to do as these men were erecting the barn and setting up the still and operating the still?")

Mr. Waldron: I object to the question on the ground that it has been answered not once but three different times.

The Commissioner: I think that is correct, Mr. Calandra.

Mr. Calandra: Then there should be no objection to answering it again.

The Commissioner: Why clutter up the record?

Mr. Calandra: I am praying for it.

The Commissioner: That is not the question. The hearing should be conducted in an orderly manner.

Mr. Calandra: Very well.

Q. Didn't you, Mr. Kell, have an arrangement with the Federal agents, one or all of them, to permit these people to go on your property, erect this barn, operate a still in there, and that you were to keep reporting what you saw to Investigator Nilson who lived in your house? Did you have such an arrangement?

Mr. Waldron: May we break that question down and get a simpler version of it?

[fol. 105] The Commissioner: Let's have the question repeated.

(Question repeated.)

The Commissioner: I think the question is an integrated question and it can be answered in its present form.

Mr. Calandra: Let's have the question repeated.

(Question repeated.)

Mr. Waldron: May it be broken down just a little bit?

Mr. Calandra: Very well, I will rephrase it.

Q. Did you have an arrangement with Mr. Casey to report to him everything you saw each one of these men do on your farm?

A. I don't quite understand your use of the word "arrangement." I had instructions.

Q. What were the instructions?

A. To report.

Q. To whom?

A. Mr. Casey.

Q. Did you get similar instructions from Mr. Gettel?

A. No.

Q. Were you instructed—did you get similar instructions from Mr. Van De Car?

A. No.

Q. Do you know him?

A. I have met him.

Q. When did you first meet Mr. Van De Car?

A. The night of June 2nd, I believe.

Q. You mean the night of the raid?

A. That's right.

Q. That was June 3rd.

A. June 3rd.

Q. On the night of June 3rd whom did you see at your farm?

A. I saw Mr. Gettel, Mr. Van De Car and Mr. Casey.

[fol. 106] Q. And where did you see them?

A. I saw them get out of an automobile at the house.

Q. Did they talk with you?

A. They didn't have much to say.

Q. Well, what did they say and who said it, naming each one.

A. I don't remember. There was no general conversation.

Q. Did they say to you, "We are going down to raid this still tonight"? Did any one of the three agents say that to you?

A. No.

Q. Did you know what they were going to do there that night?

A. Yes.

Q. When did you know it?

A. When did I know it?

Q. Yes, when did you first learn it?

A. When I saw them.

Q. In other words, you suspected they were going to raid the still that night but you didn't know it?

Mr. Waldron: I object to that as calling for a conclusion.

The Commissioner: I will allow it.

Mr. Waldron: His suspicions are not involved in the case.

Mr. Calandra: I will withdraw it.

Q. Did Mr. Gettel say to you, "Mr. Kell, we are here tonight and we are going to raid the still." Did he say that to you?

A. No.

Q. Did Mr. Homer Casey say to you, "We are here tonight and we are going to raid the still"?

A. No.

Q. Did Mr. Van De Car say, "We are here to raid the still tonight"?

A. No.

Q. What did Mr. Gettel say to you?

A. I don't remember.

[fol. 107] Q. What did Mr. Casey say to you?

A. I don't remember.

Q. What did Mr. Van De Car say to you?

A. I don't remember.

Q. Did you talk with them very long?

A. No.

Q. How long?

A. It was a matter of seconds.

Q. Seconds. All right. Just excuse me for a minute—Did Nilson tell you they were going to raid the still that night?

A. Yes.

Q. When did he tell you that?

A. During the evening.

Q. Did he have his supper with you that night?
A. No.
Q. But during the course of the evening he told you that.
A. That's right.
Q. Just give us your best recollection of what words he used when he told you that.
A. He told me, "Tonight is the night."
Q. How did he come to put it that way to you?
A. I couldn't tell you that.
Q. Did you have previous conversations with him?
A. Yes.
Q. Relating to what was going on down there?
A. Yes.
Q. And were you down there at the still yourself?
A. No—at any time?
Q. Yes.
A. Yes, my stock was in the adjoining building.
Q. And you smelled the mash there?
A. Yes.
Q. And you knew the smell of mash?
A. Yes, I became acquainted with it.
Q. How long was this thing operating there?
A. Long enough for me to become acquainted with the smell of mash.
Q. Would you say you smelled mash three or four weeks before the raid?
A. Approximately that, yes.
Q. By the way, see if you can remember this, sometime around February or March, did you write a letter to Mr. Johnson, whom you know as Roett?
A. Yes.
[fol. 108] Q. What did you say in the letter, do you remember?
A. Yes.
Q. What was it?
A. It was brief and to the point.
Q. Well, what was it?
A. I addressed it to him and said I wanted to see him.
Q. And can you fix the time, the best approximate time that you can give us. I know I am going pretty far back.
A. As to the date of the letter?
Q. Yes.
A. I don't know, approximately the middle or end of February.

Q. But it was February, about the middle of February.
A. I don't know exactly.
Q. But it was in February.
A. I am not positive. My mind is very hazy on those dates and I can't be positive.
Q. But there is no doubt at all in your mind—I will withdraw that.

The Commissioner: Is this your only witness, Mr. Calandra?
Mr. Calandra: Yes.
The Commissioner: This is off the record.

(Discussion off the record.)

Q. Mr. Kell, did you ever talk with me about this case before I questioned you this morning?
A. The question was, did I ever talk to you about it?
Q. Yes.
A. Definitely not.

Mr. Calandra: I guess that is all.
Mr. Waldron: Commissioner, do you have any questions you would like to put to the witness?
The Commissioner: No.
Mr. Calandra: I am prompted by Mr. Roett who is an attorney, as you know, and I would like to ask a further question.
The Commissioner: Surely.
[fol. 109] Q. Why did you write Mr. Roett that letter in February 1946? What was your purpose?

A. Mr. Roett had asked me to either allow him to use part of the farm or to find him a place and I had decided perhaps it would be possible for him to use part of the farm.
Q. Your farm?
A. Yes.
Q. Was that letter written after you had talked and explained to Mr. Casey what these boys were going to put on your farm?
A. I'm not sure. I saw Mr. Casey on many, several occasions, but whether it was directly after——
Q. Was it during the time that you were seeing Mr. Casey that you wrote this letter to Mr. Roett?
A. Yes, it was during that time.

Q. And did you write that letter at the instruction or behest of Homer Casey; at the instruction, or request, or behest of Homer Casey?

A. No.

Q. But neither Homer Casey, nor Mr. Gettel, nor Mr. Van De Car, nor any other Federal agent gave you any instructions not to permit this illegal operation to take place in your barn, did they, Mr. Kell?

A. No.

Mr. Calandra: That is all.

Thank you. I am through for the day, gentlemen.

* * * * * * *

[fol. 110] IN UNITED STATES DISTRICT COURT

GOVERNMENT AFFIDAVIT OF HOMER CASEY

STATE OF NEW JERSEY,
County of Mercer, ss:

Homer Casey being duly sworn according to law upon his oath deposes and says:

1. I am an Investigator in the Alcohol Tax Unit and have been such an Investigator for about eighteen years. During the past six years I have been assigned to the District of New Jersey. During my employment as an Investigator of the Alcohol Tax Unit and the Prohibition Department I have seized and assisted in the seizure of a large number of stills at which non-tax paid alcohol was being produced. I am familiar with the smell of mash and with the noises usually heard around an illicit distillery. For a number of months prior to June 3, 1946 I was in communication with Investigator Nilsen concerning certain operations that were being carried on on the premises of the Kell Farm in Wall Township, Monmouth County, New Jersey, where Investigator Nilson was working under cover. I had visited the farm and also met Investigator Nilsen away from the farm premises about three or four times a week for a number of months prior to June 3, 1946, at which time we discussed the operations that were going on at said farm and the work he was doing. For a period

of about two weeks before June 3, 1946 I had a number of radio conversations with Investigator Nilsen. He gave me certain information by voice over the radio, which information I communicated to Investigator in Charge Oliver J. Gettel. As a result of a radio conversation with Investigator Nilsen on May 31 and information obtained from him which I transmitted to Investigator in Charge Oliver [fol. 111] J. Gettel a truck was seized containing 91—five-gallon cans of non-tax paid alcohol. The truck was seized in the vicinity of the Newark Airport. I did not take part in the seizure of the truck but after the seizure thereof I followed it into the Government warehouse where I found that the truck contained the 91 cans of non-tax paid alcohol. On the night of June 3, 1946 by pre-arrangement with Investigator Nilsen, I proceeded to the premises in the company of Investigator in Charge Oliver J. Gettel, and Investigator William Van DeCar. We were met about three miles from the Kell farm by Copeland Kell who then drove us in his car to his farm. As we left the main highway and proceeded along the dirt road on his farm leading to his farm buildings he stopped the car at some distance from his farm house and we got out of the car. At that point I detected a strong odor of fermenting mash and I heard the sound of the gasoline motor running. The noise of the motor and the odor of the fermenting mash appeared to come from a building off to one side, the roof of which could be seen from the point in the road where we stopped. Investigator Van DeCar went around one end of the building and I proceeded with Mr. Gettel around the other end of the building to arrest the persons who were then operating the plant which I knew from my experience in seizing illicit distilleries, aside from the information furnished me by Investigator Nilsen, was then being operated. As I approached the building the odor of mash became stronger and the noise of the gasoline motor became louder. I went around the side of the building through a cow lot and heard Investigator Van DeCar place Antonioli under arrest. I then went around to the front of the building and through the open door I saw a copper column, a large steam boiler and a cooker for the column. I also saw several five-gallon cans containing [fol. 112] alcohol. I later counted these cans and found there were 262 of them. I then entered the premises and saw the remainder of the distillery which included four large mash vats and other distillery equipment. At that time

Riordan Roett was not at the premises but a short time thereafter I heard him calling and as he approached, assisted by Investigator Van DeCar, placed him under arrest. I also arrested Sam Monticello sometime later.

Homer S. Casey.

Sworn and subscribed to before me this 10th day of February, 1947. Emma R. Hulit, Notary Public of N. J. My Commission Expires Oct. 26, 1947. (Seal.)

[fol. 113] IN UNITED STATES DISTRICT COURT

GOVERNMENT AFFIDAVIT OF BERTHOLD O. NILSEN

STATE OF NEW JERSEY,
County of Mercer, ss:

BERTHOLD O. NILSEN, of full age, being duly sworn, according to law, on his oath deposes and says:

I am investigator in the Alcohol Tax Unit, Bureau of Internal Revenue, assigned to the New Jersey District, and have been for about two and one-half years.

1. A number of months prior to June 3, 1946, I was assigned to work undercover at the premises of the Kell Farm, Wall Township, Monmouth County, New Jersey. I worked at the premises as a farm laborer and while there saw a number of men who later erected and operated an illicit distillery at the said premises. I assisted in the erection of the building which housed the illicit distillery; also in the erection of the still column and the vats which were used to ferment the mash.

2. While the distillery was in operation I assisted in unloading the raw materials, pouring the finished alcohol into five gallon cans and later in loading those cans on trucks. During this period I was in constant communication with investigators of the Alcohol Tax Unit, namely, Investigator in Charge, Oliver J. Gettel, under whose direction I was working, Investigator Homer Casey, Special Investigator Ralph Dell and Investigator William A. Van De Car. By prearrangement I would meet one or the other of the above named investigators at different times.

3. Up to about two weeks before June 3rd, I made all contact with the Investigators of the Unit, whom I would

meet at various places a number of miles from the Kell Farm. I also met District Supervisor John C. Palmer and [fol. 114] Assistant Supervisor in Charge of Enforcement Wilbur K. Bruner. At all these meetings the conversation would be about the still building I had assisted in erecting or about the illicit distillery that I was working at on the Kell farm. I also saw and talked with defendants, Anthony Antonioli, Richard Ricciardelli, Jack Trupiano, Andrew Todero, Riordan Roett and Nicholas Carbo, amongst others at the premises. On many occasions I had talked to these persons at the still premises prior to the seizure.

4. On May 20, 1946, I gave Investigator in Charge Gettel, samples of alcohol, several sugar bags, a yeast wrapper and an empty five gallon can which I took from the still premises. The alcohol was produced at the distillery.

5. On May 31st I helped load a truck, which I had previously identified to the investigators, giving the license number, the signs on the truck and the description thereof, with 94 five gallon cans of alcohol. After assisting in loading this truck I proceeded to the farm house where I was staying, about 225 yards from the still building and where I had a radio set and radioed information to Investigator Homer Casey as to the loading of the truck with alcohol and identified the truck to him. I later saw the truck, which had been seized at the government warehouse in Newark, New Jersey. On June 3, 1946, I radioed out the information to the investigators that two of the principals, Antonioli and Roett were at the still premises and that we were waiting for a truckload of sugar. I had another radio conversation with investigator in charge Gettel, sent Copeland Kell out to the road at a point about three miles from the farm to meet Investigator Van De Car. This radio message and conversation with Investigator in Charge Gettel occurred about 11:15 or 11:30 p. m. The pump was in operation at the time and was pumping water into the vats being driven by the gasoline engine when I observed Investigator [fol. 115] Van De Car enter the premises. I was sitting in front of the building, adjacent to the door and hearing the noise to my right, looked and recognized Investigator Van De Car coming along the side of the building and I stayed there until he entered the building and I heard him arrest Antonioli. Investigator Van De Car did not see me because I was on the other side of the light and I left the still building and went across the hill where I met Investigator Casey

and Investigator in Charge Gettel. Then I went back to the Kell farm house.

6. Earlier in the evening on June 3 Roett had a gun in a pocket of his jacket. I saw him take the gun from the jacket and slip it in his pocket. In my radio conversation with the other investigators I furnished information that Roett was armed.

7. Earlier the next morning at about daybreak Special Investigator Dell and I were looking for the gun and I saw Investigator Dell find the gun, which I recognized as being Roett's. The gun was fully loaded. Dell took the shells out in my presence.

8. At the time that I left the building at approximately 11:30 P. M. Antonioli was engaging himself in replenishing the fuel of the gasoline engine which was attached to the pump used to pump water to cook the column and pump water into mash vats.

Berthold O. Nilsen.

Sworn and subscribed to before me this 10th day of February, 1947, Emma R. Hulit, Notary Public of N. J. My Commission Expires October 26, 1947.

[fol. 116] IN UNITED STATES DISTRICT COURT

GOVERNMENT AFFIDAVIT OF OLIVER J. GETTEL

STATE OF NEW JERSEY,
County of Mercer, ss:

OLIVER J. GETTEL, Investigator in Charge, Alcohol Tax Unit, Internal Revenue Bureau, Treasury Department, at Hartford, Connecticut, formerly of Newark, New Jersey, who has been connected with the Government for approximately twenty years, of full age, being duly sworn according to law upon his oath deposes and says:

1. Having received reliable information that a distillery might be erected on the Copeland Kell farm, Allenwood, Monmouth County, New Jersey, I selected Investigator Berthold Nilsen, on February 15, 1946, to act in an under-cover capacity as a farm hand. Accordingly, he reported to Investigator Casey, who in turn took him to the Kell farm. In a conference with Investigator Nilsen I spe-

cifically instructed him that he was not to entice, encourage, or make any propositions or suggestions of any kind, that he was to act merely as a dumb farm hand and that after he was propositioned to become an employee and a still worker that he should accept and play the part thereof. He was instructed to keep a detailed written memorandum or diary of each day's happenings by time, place, date, conversations, (with whom), weather conditions and any pertinent information in regard to activities. Investigator Nilson in person, and through Investigator Casey, made periodic reports on the developments happening on the Copeland Kell farm. The progress of erecting the distillery was commenced by cutting a roadway into the wooded areas on the Kell farm, making a well, building a new building to house the distillery, erecting a distillery column within the building, beginning of the operation of making alcohol on May [fol. 117] 13, 1946. On May 16, 1946 Investigator Casey turned over to me the su. of $125.00 which had been received by him from Investigator Nilsen as wages for working for the syndicate in constructing and erecting the illicit distillery on the Copeland Kell farm. On May 20, 1946, accompanied by Investigator Casey, District Supervisor J. C. Palmer, and Chief of Police Legg of Brielle, New Jersey, I had a conference with Investigator Nilsen and Copeland Kell at the home of Nilsen's father in Laurelton, New Jersey. At the time Investigator Nilsen turned over to me samples of alcohol that he had taken from the various runs which had thus far been made, together with an empty sugar bag and an empty five gallon can, which he had brought from the distillery. On May 26, 1946 I assigned Investigators Van De Carr and Special Investigator Dell to begin observation of the activities of the persons and trucks and automobiles they were using to take commodities to the still and to remove the finished product therefrom. These officers were assigned to use radio two way cars in connection with their conversations and accordingly the two way portable radio set was dispatched through Investigator Casey to Investigator Nilsen to be placed on the Kell farm so that contact could be made by air to the radio cars on the outside. Many contacts were made by air during the course of the investigation. I became acquainted with the persons appearance of trucks and automobiles used by the persons operating the distillery. Two large trucks, one XK-8632 1946 registration which had painted

on the side of inscription "Hilltop Dairy Products" and another truck, a Ford, with the inscription on the side of the door, "J. & M." truck, bearing license No. XK-8633. I continued to receive reports from Investigator Nilsen and Investigator Casey and on May 31, 1946, Friday), about 6:00 P. M., I received information that the J. & M. truck, above described, was leaving the still cite at Allenwood, New Jersey, Investigator Casey stating that it was [fol. 118] loaded with 94 cans of alcohol. I immediately proceeded from my home to Newark, New Jersey, where I picked up Investigator Fox and we proceeded to a point on Route 25 and 1, south of Newark, near the Avenel diner, in Avenel, New Jersey, to await the arrival of the truck XK-8632, bearing the inscription "Hilltop Dairy Products" on the side of the body. This truck appeared and was driven within the corporate limits of Newark, New Jersey. At Haynes Avenue the driver of the truck pulled into the entrance of the Newark Airport and was attempting to go on the other fork of the road into Haynes Avenue. At this point I drove the government truck and blocked the same. Sam Monticello was driving the truck. I asked him to alight therefrom and further requested that he open the door of the truck which was locked with a padlock. He informed us that he did not have the key for the truck nor did he know what was in the truck. Thereupon he was asked to place the contents of his pockets on the running board of the truck and among his possessions was a key that fit the lock on the rear doors of the truck. After unlocking the padlock and opening the doors therein I found a number of cans and upon examining the same found they contained alcohol. Sam Monticello was placed under arrest. The truck was taken to the government warehouse and stored therein. The arrested person was placed in the City jail at Newark, New Jersey. On June 3, 1946 I, accompanied by Investigator Van De Car, Casey and Special Investigator Dell, was in the vicinity of Allenwood, New Jersey, about 9.00 P. M. Investigator Nilsen contacted me by radio and reported the still operators being present awaiting the arrival of a load of sugar, that there was about 250 cans of alcohol at the still, that the alcohol was to be taken away from the farm upon the arrival of the sugar truck. He informed me that he would contact us when the truck left the still with the load of alcohol. We waited with the radio [fol. 119] receivers open until about 11:00 P. M. when Inves-

tigator Nilsen radioed that the truck they had (meaning the still workers) been waiting for had been delayed. I ascertained from Investigator Nilsen the name of the men at the still at that time. He informed me that Roett, alias Johnson and Tony Antonioli were at the still with him. I asked Investigator Nilsen if he would be able to come out and pick up Investigator Van De Carr and Investigator Casey and myself. Investigator Nilsen replied that he could not but that he would have Mr. Kell come out for us immediately. Accordingly, Mr. Kell picked us up at the designated spot. Investigator Van De Carr and Investigator Casey accompanied me in Mr. Kell's car, driven by Mr. Kell, to his farm where he drove into the lane thereon. As we were being driven down the lane before arriving at the house I could smell fermenting mash and hear a gasoline motor running on the right hand side coming from the newly erected still house which had previously been described to myself. After alighting from the automobile Investigators Van De Car and Casey and myself, directed by Mr. Kell, started toward the building housing the still. As we approached the building the odor of fermenting mash could be detected and became stronger the closer we came to the building. I instructed Mr. Kell to take Investigator Van De Carr around the south end of the still house for the purpose of stationing him there so that he could enter the still house door which was on the easterly side of the building. After Mr. Kell had stationed Investigator Van De Carr he came back to Investigator Casey and myself and showed us how to go around the north of the still house for the purpose of entering same. At that point Mr. Kell left Investigator Casey and myself. As I was about to crawl over the rail fence or partition, I met Investigator Nilsen on the other side. I shook hands with him and he informed me that Investigator Van De Carr had already apprehended Tony in the still house. I proceeded immediately to the small truck setting in the cleared space in [fol. 120] front of the still house for the purpose of apprehending the occupant thereof. Upon my arrival I found that Roett, who I was informed occupied this truck, had escaped temporarily. I then proceeded to the still house to assist Investigator Van De Car and found that he had in his custody one Tony Antonioli. I then returned to the truck and searched it thoroughly for papers and things of an evidenciary nature. I then instructed Investigator Casey

to take the truck and drive to the highway for the purpose of seeing if, that Roett, who had escaped, could be seen on the road or in the vicinity. I remained in the open a portion of the time thereafter when I noticed headlights on the lane leading into the farm. This vehicle turned from the lane into the road leading to the still house. When about halfway to the still house I could ascertain that it was a small truck returned, driven by Investigator Casey. About the time Investigator Casey brought the truck to the end of the road I heard a voice calling from the woods "Hey, Tony", "Hey, Tony". Upon hearing this voice I quickly rushed into the still house and caused Tony, the prisoner, to answer the call which he did. I then asked him to tell his partner to come on up to the still house, which he refused to do. I then left the still house, instructed Investigator Casey to turn off the motor and lights of the truck and to be very quiet. I ordered Investigator Casey to proceed around to the side and later Investigator Casey apprehended Roett and with the assistance of Investigator Van De Car brought him in. We later arrested other persons at the distillery which we found to be a complete distillery.

Oliver J. Gettel.

Sworn and subscribed to before me this 10th day of February, 1947, Emma R. Hulitt, a Notary Public of N. J. (Seal.)

[fol. 121] IN UNITED STATES DISTRICT COURT

GOVERNMENT AFFIDAVIT OF WILLIAM A. VAN DE CAR

STATE OF NEW JERSEY,
County of Mercer, ss:

William A. Van De Car, of full age, being duly sworn according to law, deposes and says:

1. I am an investigator in the Alcohol Tax Unit, of the Bureau of Internal Revenue and have been such an investigator for 18 years. During the past 6 years I have been assigned to New Jersey, being stationed in Trenton. During the past 18 years I have seized and assisted in the seizure of many illicit distilleries at which non-tax paid alcohol was produced. I am familiar with the smell of mash

and have seized and assisted in the seizure of many thousands of gallons of mash.

2. On the night of June 1, 1946, I proceeded to the vicinity of the Kell Farm, Wall Township, Monmouth County, New Jersey, where I had information that an illicit distillery was operating. About three miles from the Kell Farm, on the road, I met and talked to Investigator Nilsen with whom I had a conversation concerning a still that was then and there being operated on the premises, where he was working undercover. At the time we also had a conversation concerning a truckload of alcohol that was seized near the Newark Airport.

3. On the night of June 3, 1946, accompanied by Investigator in Charge Oliver J. Gettel, Investigator Homer Casey and Mr. Copeland Kell, the owner of the farm, in a car being driven by Mr. Kell, we proceeded to the Copeland Kell Farm. Mr. Kell picked us up about three miles from the farm, drove the car into a road leading into the farm premises and stopped the car at a point. At that point I got out of the car and at that time I detected a strong odor of mash and heard he noise of a gasoline motor pumping [fol. 122] something. The smell and pumping were familiar to me and indicating to me that a distillery was there and that some operation was being carried on. In numerous other distilleries I have seized I have smelled similar odors and have heard similar noises.

4. From the point in the road where we stopped I could see the roof of a building. I proceeded toward the building from which the noise was coming to arrest whoever was found at the premises operating the plant and to seize and to assist in the seizure of the said plant. As I came closer to the building the noise became louder and the smell became stronger. I proceeded around the building and through an open door saw a person whom I later found to be one Antonioli. I could see a still column to my right as I looked in this door and to the left I observed the pump where the noise was coming from. I also saw a steam boiler upright. The interior of the still premises was poorly lighted, these lights coming from two, large flashlight, electric lamps that were shining on the tin, throwing a reflection over the interior of the premises. I placed Antonioli under arrest and seized the illicit distillery.

5. After arresting Antonioli and seizing the place I observed a large number of five gallon cans which I later found contained alcohol and vats which contained fermenting mash. A few minutes later I assisted Investigator Casey in arresting Riordan Roett outside of the building.

William A. Van De Car.

Sworn and subscribed to before me this 10th day of February, 1947. Emma R. Hulit, Notary Public of N. J. My Commission Expires Oct. 26, 1947. (Seal.)

[fol. 123] IN UNITED STATES DISTRICT COURT

Appearances:

Edgar H. Rossbach, Esq., United States Attorney, by John A. Waldron, Esq., Assistant United States Attorney.

Samuel Cohen, Esq., of Counsel, Attorneys of United States.

Anthony A. Calandra, Esq., Attorney of Petitioners.

OPINION—Filed March 4, 1947

FORMAN, Judge:

The government filed a complaint against the defendants, petitioners herein, charging violation of the Internal Revenue Laws. The petitioners moved to suppress certain evidence held by the government against them, claiming that since it was obtained without a search warrant their constitutional rights were invaded. For the purpose of the motion affidavits were submitted by the government, and the petitioners offered the record of the preliminary examination before the United States Commissioner.

In January, 1946 the petitioners leased part of the Copeland Kell Farm, located in Allenwood Township, New Jersey, and they agreed to construct a roadway, a barn, dig a well and pay a monthly rental. The lessor, Kell, was suspicious and reported these facts to the government. Kell permitted the defendants to proceed with their plans, and, in fact, the government planted an agent on the premises. A still was constructed which began to operate about three

weeks prior to the night of a raid by government agents on June 3, 1946. Production was at the rate of 400 to 500 gal-
[fol. 124] lons a day. As a result of information produced by the government's secret agent, a truck containing 91 five gallon cans of alcohol was seized May 31, 1946. On information from the same source that the principals were present at the still, the government made a raid upon the premises on the night of June 3, 1946.

On approaching the farm the government agents detected a very strong odor of fermenting mash, heard a motor running and saw a still through the unclosed barn door. Fire in the boiler was banked, and the still was not in operation at the time. Government agents arrested petitioners on the premises and found several hundred cans of alcohol. The petitioners alleged that the still, alcohol, mash and other equipment were unlawfuly seized without a search warrant. The barn was about 200 yards from the house in which Kell lived.

Petitioners argue that the conduct on the part of the government not only amounts to entrapment which is not complained of on their motion, but that the same facts show that the government had information at hand sufficiently early for it to have procured a search warrant. The rule relied upon by petitioners was set forth in the case of *Taylor* v. *U. S.*, 286 U. S. 1 (1932). In that case Taylor was charged with unlawful possession of whiskey. A motion to suppress was made on the ground that evidence was seized from the garage adjacent to petitioners residence without a warrant. There was an odor emanating from the garage, but no one was within the place. While the search progressed Taylor came from his house and was put under arrest. The court stated:

"Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant oppor-
[fol. 125] tunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility."

> Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search. This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. *No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure vidence to support some future arrest.*" (Italics supplied.) 286 U. S. 1, 6.

To the above authority petitioners have added *In re Milburne*, 77 F. 2d 310 (2 Cir., 1935) and *U. S.* v. *Edelson*, 83 F. 2d 404 (2 Cir., 1936) for the proposition that where the government agents have ample opportunity to procure a search warrant they must do so. These cases relied upon the *Taylor* case, *supra*.

In this Circuit in the case of *Pong Ying* v. *U. S.*, 66 F. 2d 67, the court stated that the Supreme Court has not varied the law of the right to search without warrant when a crime is being committed in the presence of government officers. Therein, the government had information that opium was being smoked at the premises in question, and narcotic agents proceeded to the place where they smelled fumes from burning opium, heard voices inside, and gained [fol. 126] admission by breaking the door. They searched the premises without a warrant, and obtained evidence against the defendant. On motion to suppress the evidence, the court observed that there was no constitutional privilege, and that the narcotic officers would have been derelict in their duty had they not acted promptly and effectively to enter and search the apartment. In *Strauss* v. *U. S.*, 66 F. 2d 786 (3 Cir., 1933), the court stated that the officers had reasonable grounds for believing the distillery was then being operated, and it was their duty to enter, and that the lower court was right in refusing to suppress the proofs of lawbreaking found therein.

In the case of *U. S.* v. *Feldman*, 104 F. 2d 255 (3 Cir., 1939), the court quoted with approval the syllabus in *Rocchia* v. *U. S.*, 78 F. 2d 966, as follows:

> "Officers who detected strong odor of fermenting mash and distillation, and who heard still in operation before entering building, had reasonable cause for

believing that crime was being committed in their presence and could enter building and arrest defendant without first obtaining warrant, and as incident thereto could search premises and seize property used in commission of crime." 104 F. 2d 255, 257.

Cases in this Circuit bearing on this problem were reviewed in *U. S.* v. *Esposito*, 45 F. Supp. 39 (E. D. Pa. 1942), wherein government agents who made the search and seizure complained of had had the garage under observation from July 30 to November 13, 1941, the date of the arrest. The court stated:

> "If the facts observed by the government agents were such as to justify a reasonably prudent person in [fol. 127] believing that the law had been or was being violated in the premises afterward searched, then there was probable cause for the search and seizure, and the petitions should be denied—and vice versa." 45 F. Supp. 39, 40.

The government agents herein were not pressed for time but we do not think that their failure to procure a search warrant during this period requires the suppression of the evidence they found. They were drawn to the scene of the alleged crime by one of their own number allegedly working with the suspects. This was good policemanship and efficient crime detection. They were obviously waiting for the proper moment to strike. Before their entry they smelled the distinctive odors, saw the still, and heard a motor running. They apprehended the defendants involved and placed them under arrest. The test of reasonableness that must be applied in all such cases results in the disclosure of no fracture of the defendants' constitutional privileges and the motion to suppress will be denied.

[fol. 128] IN UNITED STATES DISTRICT COURT

ORDER DENYING PETITION TO SUPPRESS EVIDENCE—March 29, 1947

ORDER

On the 10th day of February, 1947, this cause came on for argument before this court at the conclusion of which opinion was reserved.

On March 4, 1947, there was filed in this court an opinion denying the petition to suppress, based on reasons set forth in the said opinion.

It is, therefore, ordered that the petition to suppress be and the same is hereby denied and that this Order be entered upon the records of the Clerk of the United States District Court at Trenton, New Jersey, and an exception hereto is noted for petitioners.

Forman, Judge, United States District Court.

Dated: March 29, 1947.

I hereby consent to the entry of the above Order to form only.

Anthony A. Calandra, Attorney for Petitioners.

[fol. 129] IN UNITED STATES DISTRICT COURT

STIPULATION IN LIEU OF DESIGNATION OF CONTENTS OF RECORD ON APPEAL—April 9, 1947

It is hereby stipulated and agreed between Anthony A. Calandra, Esquire, attorney for Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., defendant-appellants, and Edgar H. Rossbach, United States Attorney for the District of New Jersey and John W. Waldron, Assistant United States Attorney, that the following shall constitute the contents of the record on appeal, and this stipulation is in lieu of a Designation of the Contents of the Record on Appeal, to wit:

1. Petition to Suppress Evidence.
2. Testimony taken before United States Commissioner Gustave Goldstein.
3. Affidavits of Oliver J. Gettel, Homer Casey, William A. Van De Car, and Berthold O. Nilsen.

4. Opinion of the Trial Court.
5. Order denying the prayers of the petition.
6. Assignments of Error.

Dated: April 9th, 1947.

Anthony A. Calandra, Attorney for Defendant-Appellants. Edgar H. Rossbach, United States Attorney. John W. Waldron, Assistant United States Attorney.

[fol. 130] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

And Now Comes, Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., defendants-appellants, and say that in the record, proceedings and judgment aforesaid, there is manifest error, and for assignment thereof, say that:

1. The learned Trial Court erred in denying defendant-appellants' petition to suppress certain evidence seized by agents of the Alcohol Tax United and intended to be used against them in violation of their constitutional rights.

2. The learned Trial Court should have granted the prayers of defendant-appellants' petition to suppress the evidence claimed to have been illegally obtained and seized and intended to be used against defendant-appellants in contravention of their constitutional rights.

3. That the government agents should have obtained a search warrant prior to making any search and seizure of the evidence intended to be used against defendant-appellants.

4. That the Order denying the petition to suppress the evidence made by defendant-appellants is contrary to law.

Wherefore, the defendant-appellants, Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., pray that the judgment herein for the errors aforesaid, in the record and proceedings herein, may be reversed and annulled, and altogether for nothing holden, and they may be restored to all things which they have lost by reason of said judgment.

Anthony A. Calandra, Of Counsel with Defendant-Appellants.

[fol. 131] Anthony A. Calandra, Counsellor at Law, 31 Clinton Street, Newark, New Jersey

Zone 2

Oct. 1, 1947. Suggestion Approved. Biggs, J.

September 29th, 1947.

Hon. John Biggs, Jr., President Judge, U. S. Circuit Court of Appeals, United States Court House, Philadelphia, Pennsylvania.

Re: U. S. vs. Trupiano, et als.

My dear Judge Biggs:

I have been advised by Miss Ida O. Creskoff, that the argument in the above appeal cannot be heard on any other day excepting October 7th, 1947, because of the nature of the calendar.

October 7th, 1947 is the opening day of the New Jersey Supreme Court at Trenton, and I have been served with a motion by the Prosecutor of the Pleas of Essex County, New Jersey, to dismiss an appeal which I undertook for one Mollie Levin, who pending the decision of the Supreme Court, died. It is the Prosecutor's contention that death abates an appeal where death occurs prior to the rendering of an appellate decision. Argument and briefs were submitted at the May, 1947 Term and the Supreme Court reserved decision and Mrs. Levin died in June, 1947. This is the first time such a situation has arisen in our courts and the points raised on this appeal are of public interest as well as of interest to the bench and bar of our State. I am opposing this motion to dismiss on several grounds. The motion is returnable, as I have indicated on October 7th, 1947, and the very same day that I am to argue the Trupiano, et als., appeal in your Honor's court.

Frankly, my oral argument in the Trupiano case will not and could not amplify my position any more than I have submitted in my Brief. I am confident that I could do nothing more than to orally emphasize what I have already argued in my Brief.

[fol. 132] With this in mind, I communicated with the Hon. Edgar H. Rossbach, United States Attorney for New Jersey, asking his views concerning oral argument. Mr.

Rossbach is agreeable to submitting both sides by the Briefs respectfully submitted by each of us without oral argument, if agreeable to your Honor, and has authorized me to so advise you.

I have no desire whatever to delay the decision in the Trupiano, et als., appeal, and hope that by submitting the appeal, on Briefs, will meet with your approval.

Assuring you, always, of my utmost esteem and highest personal regard, I am,

Very respectfully yours, —— ——.

Endorsements: Request to Submit Case on Briefs Approved. Received & Filed Oct. 1, 1947. Ida O. Creskoff, Clerk.

[fol. 133] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9394

UNITED STATES OF AMERICA

v.

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR., Appellants

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 6th day of October A. D. 1947, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

Biggs, Circuit Judge.

Endorsements: Order Assigning Hon. Albert Lee Stephens for Argument, etc. Received & Filed Oct. 6, 1947. Ida O. Creskoff, Clerk.

[fol. 134] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9394

UNITED STATES OF AMERICA

v.

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR., Appellants

On Appeal from the United States District Court for the District of New Jersey

Submitted October 6, 1947

Before Biggs, Albert Lee Stephens and Maris, Circuit Judges

OPINION OF THE COURT—Filed October 7, 1947

Per Curiam:

The order of the court below will be affirmed.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 135] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9394

UNITED STATES OF AMERICA

vs.

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR., Appellants

Present: Biggs, Albert Lee Stephens and Maris, Circuit Judges.

On Appeal from the District Court of the United States for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed.

October 7, 1947.

By the Court, Biggs, Circuit Judge.

Endorsements: Order Affirming Order of District Court. Received & Filed Oct. 7, 1947. Ida O. Creskoff, Clerk.

[fol. 136] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Sct.:

I, Ida O. Creskoff, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Appellants' Brief, containing the printed portions of the record; and proceedings in this Court, in the case of United States of America vs. Jack Trupiano, et al., Appellants, No. 9394, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 27th day of October in the year of our Lord one thousand nine hundred and forty-seven, and of the Independence of the United States the one hundred and seventy-second.

Ida O. Creskoff, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 137] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 15, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 52,657. U. S. Circuit Court of Appeals, Third Circuit, Term No. 427. Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., Petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed November 5, 1947. Term No. 427 O. T. 1947.